DOCKET

No. 86-2019-CFX
Status: GRANTED

Title: Immigration and Naturalization Service, Petitioner
v.
Bonifacio Lorenzana Manzano

Docketed:
June 19, 1987

Court: United States Court of Appeals
for the Ninth Circuit

Vide:
86-1992

Counsel for petitioner: Solicitor General

Counsel for respondent: Mautino,Robert A.

NOTE* Time to file ext by O'Connor, J. to & inc. 6/19/87 Cited

Entry	Date	Note	Proceedings and Orders
1	May 1 1987		Application for extension of time to file petition and order granting same until June 19, 1987 (O'Connor, May 5, 1987).
2	Jun 19 1987	G	Petition for writ of certiorari filed.
4	Jul 21 1987		Order extending time to file response to petition until August 21, 1987.
5	Aug 10 1987		Brief of respondent Bonifacio L. Manzano in opposition filed.
6	Aug 12 1987		DISTRIBUTED. September 28, 1987
7	Oct 5 1987		Petition GRANTED. The case is consolidated with 86-1992, and a total of one hour is allotted for oral argument.
			**********
8	Oct 30 1987	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
9	Nov 9 1987		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
11	Nov 19 1987		Order extending time to file brief of petitioner on the merits until December 4, 1987.
12	Dec 4 1987		Brief of petitioner INS filed. VIDED.
14	Dec 18 1987		Order extending time to file brief of respondent on the merits until January 22, 1988.
15	Jan 5 1988		SET FOR ARGUMENT. Wednesday, February 24, 1988. This case is consolidated with case No. 86-1992. (4th case) (1 hr.)
16	Jan 5 1988		CIRCULATED.
17	Jan 22 1988	X	Brief of respondent Litonjua filed. VIDED.
18	Jan 22 1988	X	Brief of respondent Bonifacio L. Manzano filed. VIDED.
19	Feb 16 1988	X	Reply brief of petitioner INS filed. VIDED.
20	Feb 24 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

No. 86-2019

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

BONIFACIO LORENZANA MANZANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

4988

QUESTION PRESENTED

Whether a Philippine veteran of World War II, whose opportunity to apply for American citizenship under greatly liberalized conditions expired in December 1946, is nonetheless currently entitled to citizenship because, during a nine-month period between October 1945 and August 1946, there was no designated examiner stationed in the Philippines to whom he could have applied for naturalization.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

BONIFACIO LORENZANA MANZANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is unreported. The opinion of the district court (App., *infra*, 8a-10a) is also unreported. The findings and recommendations of the designated naturalization examiner (App., *infra*, 11a-38a) are likewise unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 4a) was entered on September 26, 1986. A petition for rehearing was denied on February 19, 1987 (App., *infra*, 5a). On May 5, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including June 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Sections 701, 702, and 705 of the Nationality Act of 1940, as amended by the Second War Powers Act, 1942, ch. 199, § 1001, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005, provided in pertinent part:[1]

> Section 701. * * * [A]ny person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and Who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; * * *. *Provided, however,* That * * * (3) the petition shall be filed not later than December 31, 1946. * * * [emphasis in original].

[1] The Nationality Act of 1940 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952 (the 1952 Act), ch. 477, 66 Stat. 280.

> Section 702. During the present war, any person entitled to naturalization under section 701 of this Act, who while serving honorably in the military * * * forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship; * * *.
>
> Section 705. The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act.

2. Section 310(e) of the Immigration and Nationality Act of 1952, as added, Act of Sept. 26, 1961, Pub. L. No. 87-301, § 17, 75 Stat. 656, 8 U.S.C. 1421(e) provides:

> Notwithstanding the provisions of section 405(a)[2] any petition for naturalization filed on or after Sep-

[2] Section 405(a) of the 1952 Act (66 Stat. 280) was a general savings clause that preserved the legal effectiveness of certain acts taken under provisions of prior law that were in other respects superseded by that Act.

tember 21, 1961, shall be heard and determined in accordance with the requirements of this subchapter.

STATEMENT

1. Respondent is a Philippine veteran of World War II who, on April 14, 1983, filed a petition for naturalization under Section 701 of the Nationality Act of 1940 (the 1940 Act or the Act), 8 U.S.C. (Supp. V 1945) 1001, as added by the Second War Powers Act, 1942, ch. 199, § 1001, 56 Stat. 182 (repealed by Section 403(a)(42) of the 1952 Act, 66 Stat. 280) (App., *infra*, 2a, 8a, 11a). Under this Section, aliens who served in the American Armed Forces during World War II were permitted to apply for citizenship under greatly liberalized conditions. As part of the program, servicemen on active duty outside the United States were allowed under Section 702 of the Act to obtain naturalization overseas by applying to special examiners designated by the Commissioner of Immigration and Naturalization. As amended by Section 1(c)(1) of the Act of Dec. 28, 1945, ch. 590, 59 Stat. 658, Section 701 specified that any petition submitted thereunder had to be filed no later than December 31, 1946.[3]

Respondent made no effort to apply for overseas naturalization while on active duty in the Philippines (App., *infra*, 8a, 12a, 37a). In July 1946, after completing his service, he inquired at the American Embassy in the Philippines about the possibility of obtaining citizenship but was told that there was no longer anyone present to assist him (*id.* at 12a). Respondent then waited 37 years before applying for citizenship under the 1940 Act. Notwithstanding this delay, he contends that he should now

[3] A detailed discussion of Sections 701-702, including prior litigation by Filipino veterans seeking citizenship under those provisions, is contained in our petition for a writ of certiorari (at 3-7) in *INS* v. *Pangilinan*, No. 86-1992, a copy of which has been provided to respondent.

be granted citizenship because, during a nine-month period between October 1945 and August 1946, there was no designated official in the Philippines to whom he could have applied for naturalization.

2. In May 1984, the naturalization examiner submitted to the district court his recommendation that respondent's petition for naturalization be denied (App., *infra*, 11a-38a).[4] The district court agreed with that recommendation and denied the petition (*id.* at 8a-10a).[5]

Respondent appealed the district court's order. On December 11, 1984, the court of appeals ordered that the submission of the appeal be withheld pending the decision of that court in *Pangilinan* v. *INS*, C.A. No. 80-4543, a case raising the same issue (App., *infra*, 7a).[6] On

[4] The examiner concluded that (1) respondent's claim is barred by Section 310(e) of the 1952 Act, 8 U.S.C. 1421(e), which precludes naturalization under expired or superseded statutory provisions; (2) the claim is barred by laches; (3) the claim is nonjusticiable because the withdrawal of naturalization authority from the Philippines was an exercise of the Executive Branch's exclusive authority in the field of foreign policy; (4) respondent's loss of an opportunity for naturalization was not the result of intentional, unjustified, or invidious discrimination by the United States government and therefore did not constitute a denial of due process; and (5) the claim is barred by this Court's decision in *INS* v. *Hibi*, 414 U.S. 5 (1973).

[5] The court rejected the government's argument that respondent's claim is barred by laches (App., *infra*, 9a). Nonetheless, relying on the Second Circuit's decision in *Olegario* v. *United States*, 629 F.2d 204 (1980), cert. denied, 450 U.S. 980 (1981), it held that the Attorney General, in withdrawing naturalization authority from the Philippines for nine months in response to concerns voiced by Philippine officials about a manpower drain, had acted within the scope of the 1940 Act (App., *infra*, 8a-9a).

[6] The order stated that submission was withheld "pending decision in *Barretto* v. *United States*, No. 80-4543." No. 80-4543 is the court's docket number for *Pangilinan; Barretto* is the name under which a prior consolidated decision was issued and reported. See *Pangilinan* Pet. 10 n.18.

August 11, 1986, the court ruled in *Pangilinan* that the government had violated the 1940 Act by withdrawing naturalization authority from the Philippines for nine months and that the Filipino veterans in the case were entitled to citizenship as an equitable remedy (796 F.2d 1091). On the same date, the appeal in the present case was submitted. Characterizing the present case as "nearly identical" to *Pangilinan* (App., *infra*, 2a), the court reversed the district court and remanded "for reconsideration consistent with" that case (*id.* at 1a-3a).

The government subsequently filed for rehearing en banc in *Pangilinan*, and it also filed a protective petition for rehearing in the present case. The panel in this case stayed the disposition of the rehearing petition pending the resolution of the petition in *Pangilinan* (App., *infra*, 6a). On February 13, 1987, the court denied the petition in *Pangilinan* (*Pangilinan* Pet. App. 28a-29a). Six days later, it denied rehearing in this case (App., *infra*, 5a).

REASONS FOR GRANTING THE PETITION

The question presented in this case is identical to the one presented in *INS* v. *Pangilinan*, petition for cert. pending, No. 86-1992, *i.e.*, whether Philippine veterans of World War II are entitled to citizenship because of the nine-month absence of a designated examiner in the Philippines during 1945 and 1946. In *Pangilinan*, the court of appeals ordered that the Philippine veterans in the case be granted citizenship as an equitable remedy for the government's withdrawal of naturalization authority in the Philippines (*Pangilinan* Pet. App. 1a-21a). As we argue in our *Pangilinan* petition (at 17-21), the revocation of the naturalization examiner's authority was a permissible exercise of Executive Branch discretion and did not violate the 1940 Act. In any event, we explain (*id.* at 21-28), Philippine veterans who did not apply for citizenship while on

active duty overseas are not entitled to equitable relief under a statute that expired more than 40 years ago.

Because the Court's disposition of the petition in *Pangilinan* should control the present case, it would be appropriate for the Court to hold this case pending its decision in *Pangilinan*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of the petition in *INS* v. *Pangilinan*, No. 86-1992.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JUNE 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-6031
D.C. Petition No. 41490

IN THE MATTER OF PETITION OF:
BONIFACIO LORENZANA MANZANO

BONIFACIO LORENZANA MANZANO, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

On appeal from the United States District Court
for the Southern District of California
Hon. Gordon Thompson, Chief Judge, Presiding
Argued – December 6, 1984
Submitted – August 11, 1986

[Filed Sep. 26, 1986]

MEMORANDUM*

Before: BOOCHEVER and HALL, Circuit Judges, JAMESON,** District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** Hon. William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

Bonifacio Lorenzana Manzano (Manzano), a native of the Philippines, petitioned for naturalization. He claims that as a veteran who fought for the United States during World War II he is entitled to American citizenship under sections 701-705 of the Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137, as amended by the Second War Powers Act § 1001, Pub. L. No. 77-507, § 1001, 56 Stat. 182 (1940 Act).

The Immigration and Naturalization Service (INS), however, argued and the district court concluded that Manzano is ineligible for naturalization under sections 701 and 702 because Manzano filed his petition after the December 31, 1946 statutory deadline. On appeal Manzano argues that (1) in withdrawing naturalization authority from the Philippines prior to the December 31, 1946 deadline, the Attorney General exceeded the scope of his statutory authority and (2) the early revocation of naturalization authority from the Philippines denied Manzano due process of law.

Because a statute is "to be construed, if such construction is fairly possible, to avoid raising doubts about its constitutionality," *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 780 (1981), and because Manzano's appeal can be resolved on the first issue, we address only whether the Attorney General exceeded the scope of his authority when he revoked naturalization for Fillipino [*sic*] veterans in October 1945, prior to the statutory deadline.

That issue was decided in a case nearly identical to this one. In *Pangilian* [*sic*] v. *INS*, No. 80-4543, Slip op. (9th Cir. Aug. 11, 1986) we held "that the Attorney General exceeded his authority and contravened the will of Congress when he revoked Vice Counsul [*sic*] Ennis's naturalization authority . . . ." *Id.* at 9. On that ground, we granted "the only effective remedy available . . . granting citizenship to the 15 Fillipino [*sic*] war veterans whose naturalization

petitions are now before us." We explained that "[t]here is simply no other way to restore the lost opportunity for citizenship that Congress offered them as a just reward for their military service in World War II." *Id.* at 25.

In light of *Pangilian* [*sic*] v. *INS*, we reverse the district court's denial of Manzano's petition for naturalization and remand for reconsideration consistent with Pangilian [*sic*].

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-6031
DC Petition No. 41490

IN THE MATTER OF PETITION OF:
BONIFACIO LORENZANA MANZANO

BONIFACIO LORENZANA MANZANO, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

[Filed and entered September 26, 1986]

JUDGMENT

APPEAL from the United States District Court for the Southern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed & remanded.

A TRUE COPY
ATTEST
Clerk of Court
By: JOSEPH WILLIAM
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-6031

IN THE MATTER OF PETITION OF:
BONIFACIO LORENZANA MANZANO

BONIFACIO LORENZANA MANZANO, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

[Filed Feb. 19, 1987]

ORDER

Before: BOOCHEVER and HALL, Circuit Judges, and JAMESON,* District Judge.

The stay on consideration of Respondent-Appellee's motion for rehearing is hereby lifted. The petition for rehearing is DENIED.

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* Hon. William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-6031

IN THE MATTER OF PETITION OF:
BONIFACIO LORENZANA MANZANO

BONIFACIO LORENZANA MANZANO, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

[Filed Dec. 4, 1986]

ORDER

Before: BOOCHEVER and HALL, Circuit Judges, and JAMESON,* District Judge.

Consideration of Respondent-Appellee's motion for rehearing is stayed pending disposition of the petition for en banc rehearing in *Pangilinan v. INS,* 796 F.2d 1091 (9th Cir., 1986).

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* Hon. William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-6031

IN THE MATTER OF PETITION OF:
BONIFACIO LORENZANA MANZANO

BONIFACIO LORENZANA MANZANO, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

[Filed Dec. 11, 1984]

ORDER

Before: BOOCHEVER and HALL, Circuit Judges, and JAMESON,* District Judge.

Submission of this appeal is withheld pending decision in *Barretto v. United States,* No. 80-4543.

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* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 41490

IN THE MATTER OF THE PETITION OF NATURALIZATION OF
BONIFACIO LORENZANA MANZANO

June 14, 1984

MEMORANDUM DECISION AND ORDER

Petitioner is a native and citizen of the Philippines. The record establishes that on July 1, 1944 he enlisted in the Philippine Commonwealth Army, including the recognized guerillas, and was honorably discharged on March 2, 1946. His military service has been recognized by the United States Government as constituting service in the Military Forces of the United States.

The record establishes that the Petitioner never made any inquiry or effort to apply for United States citizenship while he was serving in the military.

Petitioner is seeking naturalization under sections 701-705 of the Nationality Act of 1940, as amended, 56 Stat. 182-183. Petitioner is ineligible for naturalization under the current statute, 8 U.S.C. 1440, which requires that eligible servicemen either have enlisted in particular geographical areas not including the Philippines or have been admitted to the United States as permanent residents. The sole issue presented to this Court is whether the Petitioner can be naturalized under the 1940 Act, as amended, which expired on December 31, 1946.

There is no dispute that the Petitioner is a category II veteran (see *Naturalization of 68 Filipino War Veterans,* 406 F. Supp. 931 (N.D. 1975)). Having considered the entire record and testimony of the Petitioner, the Court is persuaded that the decision in *Olegario v. United States,* 629 F.2d (1980), *cert. denied,* 49 U.S.L.W. 3663 (March 9, 1981) has correctly analyzed the law and that the petition for naturalization must, therefore, be denied. The Court concludes that the decision to withdraw the naturalization examiner from the Philippines was not beyond the limits of the Attorney General's discretion or Congress' mandate for the Executive Branch to implement the 1940 Act, and was, therefore, not a violation of the due process clause of the Constitution. Additionally, the Court concludes that the decision to withdraw the naturalization examiner was justified by a significantly important interest in foreign affairs in responding to the concerns voiced by the Philippine Government and did not, therefore, violate the equal protection clause of the Constitution.

The Court would note that the Petitioner is not barred by laches from instituting this action. Laches demands more than delay; it requires lack of diligence. *City of Davis v. Coleman,* 521 F.2d 661 (9th Cir. 1975). The Government has failed to establish that Petitioner has slept upon his rights and has failed to establish that the Government will be unfairly prejudiced by Petitioner's delay in instituting this action.

It should be noted, that the Court feels that if the Petitioner exercises his option of pursuing an Appeal, the Immigration and Naturalization Service should not attempt to enforce his departure from the United States.

Accordingly, for the aforementioned reasons it is ordered that the petition for naturalization be denied.

It is further ordered that the Immigration and Naturalization Service not attempt to enforce the Petitioner's departure from the United States until he has had the opportunity to exercise his appeal rights to the fullest extent.

IT IS SO ORDERED.
Dated: June 14, 1984.

/s/ GORDON THOMPSON, JR
Gordon Thompson
Chief Judge
United States District Court

APPENDIX G

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Petition No. 41490

PETITION FOR NATURALIZATION
OF
BONIFACIO LORENZANA MANZANO

[May 11, 1984]

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATION
OF DESIGNATED NATURALIZATION EXAMINER.**

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

I.

The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above named Petitioner, a native and national of the Philippines, born in Asingan, Pangasinan on August 30, 1923, presently in the United States in the status of a nonimmigrant visitor for pleasure, who has overstayed his visa, filed the petition for naturalization numbering above on April 14, 1983, under section 701 of the Nationality Act of 1940, as amended, (Act of March 27, 1942; 56 Stat. 182).

II.

The questions presented in this matter are: Whether the Petitioner is now eligible to be naturalized under the provi-

sions of the Nationality Act of 1940 (supra) due to service during the Second World War, which statute expired by its own terms on December 31, 1946, and under current section 329 of the Immigration and Nationality Act (8 U.S.C. 1440); whether the Petitioner now has standing to sue due to his failure to show that he was injured in fact by the absence of notice and due to the withdrawal of the Naturalization Examiner from the Philippines; even if he were injured in fact, whether he should now be afforded equitable relief because he waited over thirty years after the statutory deadline and is therefore guilty of laches; whether the withdrawal of the naturalization authority from the Philippines was the exercise of exclusive authority in the field of foreign policy, and therefore is not a justiciable issue before this Court; and whether such conduct did not violate due process under the circumstances prevailing at the time.

III.

At the preliminary examination on his petition for naturalization, conducted on April 14, 1983 at San Diego, California, at which time he was represented, the Petitioner was sworn in and testified that he had served honorably in the United States Forces from July 1, 1944 to March 2, 1946 (See application to file for naturalization, Exhibit #1A.) [omitted]. Verification of his service and its honorable character has been obtained from official records (Exhibit #1B) [omitted].

According to the Petitioner's testimony, which was preserved in affidavit form (Exhibit #1C) [omitted], the Petitioner made no inquiry or application concerning his eligibility for naturalization as a United States citizen at any time during his military service, but that he did inquire in July 1946 at the American Embassy in Manila, the Philippines, but was told that nobody was any longer present to assist him for naturalization.

Based on this record, the designated Naturalization Examiner concluded that the Petitioner was a category II applicant based on the [d]ecision in *Matter of Naturalization of 68 Filipino War Veterans,* 406 F.Supp. (N.D. Cal. 1975). This position was based on the fact that although the Petitioner allegedly did make inquiry in July 1946, this would not have eventuated in his naturalization since he had already been discharged from the service and section 702 of the Nationality Act as amended (56 Stat. 183) provided for overseas naturalization of those then serving (see Exhibits #1B and #1C). The Petitioner's case was, therefore, put in a pending posture to await resolution of a similar case which was pending in the United States Supreme Court on a Petition for Writ of Certiorari (see *United States v. Mendoza,* No. 82-849, January 10, 1984).

On February 8, 1984, the Petitioner's new Counsel of record filed a Motion to Calendar to the United States District Court at San Diego, California. The Immigration and Naturalization Service (hereinafter the Service; INS) opposed the Motion and the Court continued the Motion to see what developed in the case pending in the Supreme Court. On January 10, 1984, the Supreme Court held in *Mendoza* that the United States could not be collaterally estopped on an issue that had been adjudicated against it in an earlier lawsuit. The Court, therefore, reversed the United States Court of Appeals for the Ninth Circuit and remanded the case for the Ninth Circuit for it to consider other aspects of the case.[1] Based on this ruling, the United States District Court at San Diego, California set this case for final hearing on May 1, 1984. By stipulation, the matter was reset to June 4, 1984.

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[1] Two other cases, *Pangilinan v. INS,* No. 80-4543 and *INS v. Litonjua,* No. 83-6064 were also remanded to the Ninth Circuit on the same basis.

IV.

A discussion of the history of dispute in the line of cases appropriate [*sic*]. Section 701 of the Act of March 27, 1942 sought to reward through naturalization those who were then serving or who had served honorably on active duty with the Armed Forces of the United States. As stated earlier, section 702 of the Act (56 Stat. 183) provided for the overseas naturalization of those then serving. The provisions of both of these Acts expired on December 31, 1946. During the statutory period, designated government officials traveled to various parts of the world to examine applicants and actually confer naturalization administratively. This was one of the very few times during our Nation's history that such administrative procedures were available. The Philippines were among the overseas locations visited by those officers following the recovery of those islands by friendly forces. However, due to remonstrations by certain Philippine officials to the U.S. Government, the American Government officer's naturalization authority was withdrawn for a period of approximately nine months, from October 1945 to August 1946. Such a situation did not occur elsewhere. Thus, for this nine-month period, naturalization was not available to qualified servicemen then in the Philippines.

Section 701 of the Act of March 27, 1942 called only for honorable service in the United States Armed Forces and did not require, as does its current successor statute, section 329 of the Immigration and Nationality Act (8 U.S.C. 1440), that the serviceman be enlisted in a qualifying geographic area or that he have been at any time lawfully admitted to the United States for permanent residence. Those geographically qualifying areas are: the United States, the Canal Zone, American Samoa and Swains Island. Most of the Filipino nationals had either enlisted in the Philippines in such units as the Philippine Scouts (part of the United States Armed Forces) or, being members of

the Commonwealth Army of the Philippines, had been incorporated by executive and military orders into the United States Armed Forces. Others served in guerrilla units recognized by the United States Armed Forces. Our Petitioner was in the Commonwealth Army of the Philippines.

Within recent years, the situation of another Filipino native and veteran of World War II was considered by the United States Supreme Court (*INS v. Marciano Haw Hibi*, 414 U.S. 5 (1973)). In *Hibi*, the Supreme Court considered the petitioner's argument that the Government was estopped from using t e cutoff date of December 31, 1946, as spelled out in section 701 of the 1940 Act, since the Government, by withdrawing its examiner from the Philippines for a period of several months, had effectively denied Filipino veterans the opportunity to apply at that time. *Hibi* had not applied nor tried to apply prior to December 31, 1946. The Supreme Court was not persuaded by that argument.

In a split decision, the Court ruled that since Hibi had not applied for naturalization until many years after 1946, the withdrawal of the examiner did not rise to the level of "affirmative misconduct" required to successfully invoke estoppel against the Government. Even though the Court concluded that naturalization under section 701 was no longer available to Hibi on the issue of estoppel, there was no hint of what the decision might have been had Hibi attempted to apply before that section's expiration.

Subsequently, a number of Filipino World War II veterans residing in San Francisco, California filed petitions for naturalization claiming eligibility under the same provision. Their petitions were joined and, notwithstanding the Supreme Court's decision in *Hibi*, the United States District Court found the majority of the 68 Filipinos eligible for naturalization under section 701 of

the Nationality Act, as amended. (See *Matter of Naturalization of 68 Filipino War Veterans,* 406 F.Supp. 931 (N.D. Cal. 1975).)

This Court will note that the San Francisco Court divided the 68 petitioners into three categories. In the first category were those veterans who proved to the Court that they applied, or had made a reasonable effort to apply, before December 31, 1946, but were denied the opportunity to file formal petitions because of the Government's withdrawal of its overseas officer. The Court, distinguishing *Hibi*, found that these persons had "constructively" filed petitions and that the Government was estopped, notwithstanding *Hibi,* from now denying them naturalization.

In the second category were those veterans who convinced the Court that they would have applied had the officer not been withdrawn. These persons, like *Hibi*, took no steps to apply until many years later. With respect to these, the Court found that the veterans had been denied due process, an issue not raised or decided in *Hibi.* It reasoned that, since before July 4, 1946, Filipinos were non-citizen nationals of the United States[,] they owed permanent allegiance to the United States. In turn, they were entitled to the protection of the United States Constitution, and thus, due process.

The final category included several Filipinos who could not produce the critical proof of qualifying honorable and active service in the United States Armed Forces during the World War II period. The Court gave this group additional time to produce that proof. Since evidence was not forthcoming, the petitions of those in the third category were dismissed.

Regarding categories one and two, the Government sought appeal. The [a]ppeal was grounded primarily on the fact that the petitioners' cases were not essentially distinguishable from that in *Hibi.* Briefing was completed and the Appeal awaited oral argument in the Ninth Circuit Court of [a]ppeals.

In a memorandum dated September 21, 1977, the Commissioner of the Immigration and Naturalization Service recommended to the Department of Justice that the Appeal be withdrawn. Officials at the Department of Justice agreed, and, in an Order dated November 30, 1977, the Court of Appeals granted the Government's Motion to Dismiss. The Order made no comment one way or the other on the merits of the case(s).

Upon re-examination, the Government has adopted the reasoning of the San Francisco Court only as to Filipino World War II veterans in the first category.

The Petitioner in this case therefore falls within category two, in that he was eligible to naturalize and was in the Philippines during a portion of the disputed nine-month period. Between October 1945, when the authority of the examiner was removed and when Mr. Manzano was discharged in March 1946, he was physically in the Philippines. He was not eligible to naturalize after he was discharged in March of 1946. As stated earlier, the terms of section 702 required that the veteran must still be on active duty before he could naturalize. Therefore, the Government's "exposure" under category two is limited to the period between October 1945 and March 1946, a period of approximately five months.

It is, however, the Government's position that the naturalization of those veterans in the second category is unsupported by statute and precedent. Notwithstanding the decision in the San Francisco case, and for the following reasons, the Government must recommend that this petition for naturalization be denied.

The current Immigration and Nationality Act of 1952 was amended by the Act of September 26, 1961, sec. 17 (75 Stat. 656). Specifically, section 310 of the 1952 Act was

amended by the addition of subsection (e) thereof, (8 U.S.C. 1421(e)). The amendment provided that, notwithstanding the savings clause of the Act, all petitions for naturalization filed after the effective date of the amendment would be determined in accordance with the requirements of the 1952 Act still in effect. As indicated earlier, the basic and current Act requires, under section 329 (8 U.S.C. 1440), that qualified servicemen or veterans must have enlisted (or reenlisted, by judicial interpretation) in certain geographical areas or have been admitted to the United States for lawful permanent residence.

The District Court, in the cases of the 68 veterans, did not discuss secton 310(e) in reaching its conclusion as to either categories one or two. If category one veterans are determined to have "constructively filed" their petitions in 1946, section 310(e) does not apply, and the savings clause, section 485(b) (8 U.S.C. 1101 note), would allow their petitions to be heard and determined in accordance with the requirements of law in effect when such petitions were filed.

The present Petitioner, however, made no attempt to apply for naturalization until well after the enactment of section 310(e), and, as such, is bound by the requirements of the present statute (8 U.S.C. 1449). Since he was neither enlisted nor inducted in the qualifying geographical area outlined above, and is not a lawful permanent resident of the United States, the requirement is not met.

In a decision dated October 17, 1975, just over three weeks prior to the District Court's Judgment in the cases of the 68 Filipino veterans, the Ninth Circuit Court of Appeals ruled that section 310(e) of the Act (supra) barred the naturalization of a veteran whose eligibility was claimed on the basis of the provisions of a prior statute, *U.S. v. Pasion*, 524 F.2d 249 (9th Cir. 1975).

In *Pasion* the petitioner was a Filipino World War II veteran who failed to file a petition for naturalization prior to December 31, 1946. He petitioned for naturalization in 1974, claiming that a 1940 statute had given him permanent residence status, and that such status was preserved by the "saving clause" in the 1952 Act. The Ninth Circuit Court held that section 1421(e) unambiguously cut off all rights under prior naturalization statutes, stating:

> "The statute is not ambiguous. It requires petitions for naturalization to be determined by reference to the standards currently in effect, without circumvention by application of the savings provision of section 405(a). A[s] appellant has never been admitted for permanent residence, and as his arguable implied status survives only by operation of section 405(a), we are clear that section 1421(e) forecloses reliance on that implied status to meet the requirements of 8 U.S.C. 1440. Moreover, even if section 1421(e) were ambiguous, reference to the legislative history of the section makes clear that Congress intended to foreclose what the eclectic appellee here attempts, and to impose uniform burdens upon contemporaneous petitions for naturalization. The House Judiciary Committee's Report on the bill explains:
>
> > Section 17 (i.e., [8] U.S.C. section 1421(e)) amends section 310 of the Immigration and Nationality Act (of 1952) so as to require all petitions for naturalization filed after the enactment of this section to be heard and determined in accordance with the requirements of this Act.
>
> The purpose of this amendment is to overcome interpretations placed upon the savings clause (sec. 405 of the Immigration and Nationality Act (*United States v. Menasche*, 348 U.S. 528, 75 S.Ct. 513, 99 L.Ed.

6615 (1955); *United States v. Wolff,* 270 F.2d 422, 3 Cir., cert. den., 362 U.S. 928 (1960); *Medalion v. United States,* 279 F.2d 162, 2 Cir. (1960)), holding in effect, that residence in the United States before December 24, 1952 was sufficient to confer naturalization rights under the Nationality Act of 1940, as amended, notwithstanding its repeal on that date by the Immigration and Nationality Act. As a consequence petitioners of this claim are being considered eligible, 9 years after its repeal, for naturalization under the 1940 law, and, if more favorable to the circumstances in their cases, they may elect to claim the benefits of the Immigration and Nationality Act. This, notwithstanding the fact that the petition for naturalization was not filed until after December 24, 1952, when the Immigration and Nationality Act became effective.

> In the opinion of the committee, such interpretations are contrary to the intent of Congress clearly indicated in the basic Immigration and Nationality Act. The administration of two nationality laws simultaneously is cumbersome, inefficient, and unfair to other applicants for naturalization. In accordance with the original purpose of the Immigration and Nationality Act, this clarifying amendment will make it amply apparent that from and after its enactment the requirements and provisions of the Immigration and Nationality Act will be uniform and will apply to all petitioners for naturalization. The Department of Justice endorses this amendment in its report of July 7, 1961, on a similar provision contained in H.R. 6300; *United States v. Pasion,* at 251-252."

The *Menasche, Wolff* and *Medalion* cases all involved hybrid claims of eligibility for naturalization under both the 1940 Nationality Act and the 1952 Immigration Act, whereby the claimants were selectively accorded the

benefits of both Acts without the burdens. For example, Menasche claimed that he was entitled to credit for his period of residency in the United States prior to the 1952 Act and that, because he became a resident before the 1952 Act added the "physical presence" requirement, he did not have to comply with it. Despite the fact that he had not filed his petition for naturalization within seven years of the date on which he filed his "Declaration of Intention," laches having barred his naturalization under the 1940 Act, he claimed that since the present Act no longer required a "Declaration of Intention," he should be naturalized. The Supreme Court so held. In *Wolff,* the same claims were approved by the Third Circuit.

In *Medalion,* the Second Circuit admitted the petitioner to naturalization because of residence prior to the 1952 Act, and waived the "physical presence" requirement despite the fact that he would have been barred from naturalization under the 1940 Act because he never filed the Declaration of Intention. It was the result that these petitioners were accorded the benefits of both Acts, without the burdens of either—all this because of the savings clause—which the Legislature undertook to correct for the future saying:

> "The administration of two nationality laws simultaneously is cumbersome, inefficient, and unfair to other applicants for naturalization."

In the present case, Mr. Manzano seeks naturalization under prior law, although he has not met the December 31, 1946 filing deadline under that law. He does not meet the present statute's requirement of lawful admission for permanent residence; whereas *Pasion* attempted to resurrect prior law through the savings clause, the present Petitioner is using a due process claim. The result is the same—the administration of two Nationality Acts "simultaneously," which results Congress expressly intended to preclude in enacting section 1421(e).

Furthermore, the situation of category two veterans is indeed indistinguishable from that in *Hibi* (supra). Since no attempt was made to inquire or apply in the Philippines prior to December 31, 1946, the Government's failure to have an examiner in the Philippines did not amount to the "affirmative misconduct" necessary to invoke estoppel, nor was it a denial of due process.

It is the position of the Government that naturalization under section 702 of the Nationality Act of 1940 is not available to a Filipino World War II veteran who cannot prove that he made a reasonable inquiry or application prior to the expiration of the above section on December 31, 1946, while still in an active duty status.

V.

This Petitioner has failed to show that he was injured, in fact, by the absence of notice and the withdrawal of the Naturalization Examiner. This is further emphasized by the fact that when he did learn about naturalization in July 1946 he took no constructive steps to ascertain if he could then apply (Exhibit #1C). Even if he were injured, in fact, he should not be afforded equitable relief because he waited over thirty years after the statutory deadline. He is guilty of laches.

In *Hibi,* the Supreme Court clearly considered the delay in filing the petitions for naturalization as a prime reason for denying equitable relief. It concluded the opinion by saying:

> "Respondent's effort to claim naturalization under [a] statute which by its terms had expired more than 20 years before he filed his lawsuit must fail. *Hibi,* at 9."

Although the Court did not use the word "laches," that principle was what the Court had in mind.

> Laches is a neglect or failure on the part of a party in the assertion of a right, continuing for an unreasonable and unexplained length of time under circumstances permitting diligence, resulting in disadvantage to the other party. *Rank v. Krug,* 142 F.Supp. 1, 123 (S.D. Cal. 1956); affirmed in part, reversed in part on other grounds, 293 F.2d 340; affirmed in part 372 U.S. 62.
>
> A court of equity will not give relief against conscience or public convenience when a party has slept on his rights. *Wagner v. Baird,* 48 U.S. 234 (1949) [*sic*: 1849]).

Laches is a defense to equity action which operates independently of statutes of limitations. *Russell v. Todd,* 309 U.S. 280 (1939).

Hibi did not take all the affirmative steps available to him. The same is true of this Petitioner. The only evidence of the Petitioner inquiring about naturalization occurred at a time when he would have been statutorily barred because he had already been discharged from the service.

The delay of the [c]laimant in asserting his alleged right to citizenship is unjustifiable. There were other avenues of relief open, but for unexplained reasons he did not trouble to explore or take advantage of his options. The delay has frustrated the Government and the Court in ascertaining the facts, and goes against the clear congressional policy of cutting off prior naturalization rights as of September 26, 1961. This delay not only diminishes the credibility of the claim, but under the Supreme Court's *Hibi* decision, constitutes a dispositive reason for its denial. This Petitioner's effort to claim naturalization under a statute, which by its terms expired more than 30 years before, must fail.

VI.

The withdrawal of the naturalization authority from the Philippines was the exercise of exclusive authority in the field of foreign policy, and is, therefore, not a justiciable

issue. Such conduct did not violate due process under the circumstances prevailing at the time.

In order to naturalize Mr. Manzano, this Court must rule that this Petitioner, if he had sued in October of 1945, could have persuaded a court of the United States to order George H. Ennis, Vice Consul of the United States at Manila, to disregard the concerns of the Philippine Government. The Constitution commits such matters to the exclusive discretion of the Executive Branch. It was beyond the power of the judiciary to afford remedy on the basis of an act of foreign policy in 1945, and it is still beyond a court's power to do so.

There is no convincing argument against the fact that the withdrawal of the authority to naturalize Filipino World War II veterans was for the reason that the Philippine Government opposed the loss of its former fighting men during the postwar rehabilitation period. The Philippine Govenment's position was never formally expressed because at that time the Philippine Government supported proposals for the legislative grant of citizenship to *all* citizens of the Philippines. It could hardly oppose naturalization of a segment of the population consistently with its official advocacy of United States citizenship for all. Thus, through unofficial communications through the State Department, the Philippine Government let its true wishes be known apparently more than once. Judge Renfrew, in the *68 Veterans* case, highlighted the principle that it is because such unofficial or confidential communications are essential in the conduct of foreign relations that foreign policy matters are not justiciable. However, he erred in his application of the criteria for determining justiciability unenunciated [*sic*] in *Baker v. Carr,* 369 U.S. 186 (1962).

In *Baker v. Carr,* the Supreme Court, by Mr. Justice Brennan, set forth six criteria for determining whether a

question is justiciable. After a lengthy analysis of cases involving nonjusticiable questions, he wrote:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a Court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of Government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments of one question." *Baker v. Carr,* supra, at 217.

Judge Renfrew considered each of these criteria and found that the *68 Veterans* case does not satisfy *any* of those criteria. The Government disagrees. This case clearly poses a purely political question by most, if not all, of the criteria, under the *Baker* decision; if a question satisfies *any one* of the six criteria, it must be dismissed as nonjusticiable.

First, Judge Renfrew glossed over the fact that Article 2, Section 2, of the Constitution commits the conduct of foreign relations to the President. He stated on page 23 of his opinion: "There can be no doubt that the Constitution commits the foreign policy power to the *Executive and Legislative Branches . . .* " Although we agree with Judge Renfrew that an issue is not beyond the Court's cognizance purely because it touches on foreign policy, this is a case where foreign policy was the central consideration in the act complained of. By the first of the *Baker* criteria, the "textual commitment" test, the issue whether the consul should or should not have naturalized Filipino veterans

between October 1945 and August 1946 is not justiciable. The second test is whether there are "judically discoverable and manageable standards" by which to decide the issue. Certainly a court is competent to rule on the issue of equal protection, but it cannot be called upon to ascertain or manage the standards against which to decide whether the request of a foreign government, relating to the conduct of consular affairs within its territory, should be respected or ignored. By the second of the *Baker* criteria, the issue is non-justiciable.

The third test is whether the decision would involve an "initial policy determination of a kind clearly for non-judicial discretion." The policy decision involved was not whether or not to grant citizenship rights to Filipino war veterans; the policy decision was whether or not the United States could afford to ignore the concern expressed by the Philippine Government. That issue was one of first impression and was clearly of a kind for non-judicial discretion.

Fourth, there can be no dispute that for a court to usurp that discretion would not only express a lack of the respect due the coordinate branches of the Government, but would implicitly subjugate the executive prerogative in foreign affairs to the Judicial Branch.

Fifth, there is a need for adherence to the political decisions already made, although in this case the INS has no reservations about full inquiry into the reasons for adherence to the decision made in 1945. We should adhere to that decision because any other course of action opens the door for any veteran who did nothing to seek naturalization before December 31, 1946, but has since changed his mind to be naturalized now, more than thirty years after his rights lapsed. No one has argued that any veteran who merely changed his mind after he had missed the deadline should now be naturalized. Nevertheless, that is precisely the effect of the San Franciso District Court's

holding. Without any showing that they were interested enough to file an application or write a letter in 1945-46, applicants could be admitted to United States citizenship, and there would be no obstacle to countless thousands of veterans still in the Philippines. As the Government strenuously argues in San Francisco, the immigration policies of Congress and of the INS have been formulated on the basis that the World War II veterans' rights lapsed over thirty years ago. Congress affirmatively and expressly cut off these rights in 1961. The burdens of accommodating the large number of eligible veterans was considered in 1946 to be overwhelming. Today, each eligible veteran, if granted citizenship, will be entitled to petition for nonquota immigrant visas for his immediate relatives (see 8 U.S.C. 1151(b)). The actual number of unexpected immigrants is unknown, but suffice it to say that, in view of the difficulty of absorbing the 130,000 Indochinese refugees from the Communist takeover of 1975, when the refugees were all eventually *sponsored* by individual United States families, and now with the influx of over 100,000 Cuban refugees, the influx of a large number of new unsponsored immigrants presents good reason for adherence to the past decision. The principle that existence of legal rights does not turn on the number of persons asserting the rights, articulated by Judge Renfrew, is not helpful in deciding whether there is any policy reason for adhering to past executive decisions. There are valid reasons here.

Sixth, the passage of time does not, as Judge Renfrew decided, erase the concern of other governments that they may not be able to rely on the actions of the State Department as the United States representative in foreign affairs. The prospect that a court can reverse foreign policy *thirty years after the fact* is no less unsettling than the proposition which necessarily flows from Judge Renfrew's decision; that in 1945 a court could have ordered the natural-

ization of foreign nationals at the United States Embassy in their country over the objections of their government.

The central issue of this case, the propriety of withdrawing the naturalization authority from the Philippines, is a political question which is not justiciable. By most, if not all, the test set forth by the Supreme Court in *Baker v. Carr,* this issue is not a proper subject of judicial inquiry. Consequently, it was in error for the San Francisco District Court to decide that this was a wrongful act and to hold that this act sparked rights which survived Congressional acts to extinguish any such rights, only to burst forth thirty years later.

Four Judges of the Ninth Circuit Court have concurred in the view that:

> The conduct at issue in *Hibi* was not the negligence or malfeasance of minor officials, but a deliberate decision of policy by the Attorney General. Although acting in the face of a contrary congressional purpose, the Executive Branch was attempting to advance diplomatic relations between the United States and the Philippines. Regardless of whether the Government's conduct constituted an abuse of discretion, its decisions were so patently of the type committed to the Executive Branch that the Court was extremely reluctant to nullify them over 20 years later in order to relieve one individual instance of hardship. Chote [*sic*] Circuit Judge, joined by Judges Browning, Ely, and Hufstedler, dissenting in *Santiago, et al v. INS,* 528 F.2d 448, 496 (9th Cir. 1975).

VII.

The loss of the opportunity for naturalization was not the result of intentional, unjustified, invidious discrimination by the United States Government, and thus does not constitute a denial of due process. Even if a withdrawal of the naturalization authority from a given country had

been the unilateral act of the United States Government, it would not constitute a denial of equal protection unless it were an intentional, arbitrary, and invidious discrimination against natives of the Philippines, without any rational basis. In this case, the basis for the Executive action was that the Philippine Government opposed the naturalization of Filipinos in the Philippines. There can be no serious argument that this does not constitute a rational basis for withdrawing the naturalization authority from the Philippines and not from other countries. The withdrawal of the naturalization authority from the Philippines was not done for the purpose of discrimination against Filipinos. Without purposeful discrimination, there is no denial of equal protection. The Supreme Court, in *INS v. Hibi,* 414 U.S. [5] (1973), held that neither the unavailability of a naturalization examiner, nor the failure to publicize the rights to naturalization under the Second War Powers Act constituted an equitable ground for granting a petition filed 20 years late. A *fortiori,* these omissions cannot constitute a legal basis for this relief.

Under Supreme Court decisions, the Equal Protection Clause does not command that all persons be treated with absolute equality. It requires only that when the law draws distinctions between classes of persons, the classifications bear some relation to a legitimate governmental purpose. *Morey v. Doud,* 354 U.S. 457 (1957).

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have act[ed] within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland,* 366 U.S. 420, 425, 426 (1961).

The Equal Protection Clause prohibits only individual [*sic*] and arbitrary discrimination. *Goesaert v. Cleary,* 335

U.S. 464 (1948). The standard for Federal statutes is the same. See, e.g., *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

Thus, in *Filipino American Veterans and Dependents Association v. United States*, 391 F.Supp. 1314 (N.D. Cal. 1974), the Court upheld a Federal statute which accorded Filipinos half the monetary veterans' benefits available to other veterans. The basis for the distinction was that Congress deemed half-benefits sufficient because the cost of living is far less in the Philippines. The Equal Protection Clause does not equalize all circumstances; it merely prohibits disparate treatment for persons in the same circumstances.

Mr. Justice Frankfurter summarized:

> "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

The circumstances of this case were that the Philippine Government opposed naturalization of Filipino war veterans in the Philippines, while no other countries objected.

Federal statutes do not deny equal protection of the laws because the circumstances of affected persons vary with the laws of the different states. Thus, a person convicted under the Federal Firearms Act as a person "who has been convicted of a crime of violence" cannot complain that the crime of violence listed in the Act (murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking, assault with intent to kill, commit rape or rob, assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year) are differently defined in the various states and territories. *Cases v. United States*, 131 F.2d 916 (1st Cir. 1940). A Federal Estate Tax Statute, in

allowing a deduction for state inheritance taxes, does not deny equal protection to citizens of Florida merely because that state does not tax inheritances. *Florida v. Mellon*, 273 U.S. 12 (1927); *Semble, B.F. Sturtevant v. Commissioner of Internal Revenue*, 75 F.2d 216 [*sic*: 316] (1st Cir. 1035 [*sic*: 1935]).

In this case, the circumstances of the Filipino war veterans did not permit equal treatment. Thus, if Congress had expressly excluded Filipinos from naturalization on the grounds of their government's opposition, the statutory distinction would have been unassailable. Likewise, this same distinction drawn, as the circumstances required by the Executive Branch, is no less valid, rational and reasonable. As a practical matter of foreign policy, Filipinos could not be naturalized in the Philippines; as the Supreme Court stated in *Dominion Hotel v. Arizona*, 249 U.S. 265, 268 (1919):

> "The Fourteenth Amendment is not a pedagogical requirement for the impracticable."

The Equal Protection Clause does not prohibit the unavoidable, rational and reasonable basis for the distinction drawn in this case. The Government has no argument with the principle that:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to make unjust and illegal discrimination between persons under similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution"; *Yick Wo v. Hopkins*, 118 U.S. 356, 373, 374 (1886).

However, in the case of allegedly discriminatory *Executive* action, a requirement of purposeful and intentional discrimination is added to the requirement that the classification be without a rational basis.

The "rational basis" test applied [*sic*] to distinctions drawn by the Executive, just as it does to those drawn by the Legislature.

> [T]he conscious exercise of some selectivity in enforcement is not in itself a Federal constitutional violation; *Oyler v. Boyles*, 368 U.S. 456 (1962).

Relying on the *Oyler* case, the Ninth Circuit Court found no violation of equal protection as incorporated in the Fifth Amendment's dúe process clause on a criminal defendant's allegations of selective prosecution. In *United States v. Socco*, 428 F.2d 264 (9th Cir. 1970), the Court, finding that the decision to investigate and prosecute the defendant under the alien registration law was based on his suspected role in organized crime, held that this was a rational basis for the Executive decision.

The landmark *Yick Wo* case involved a San Francisco ordinance prohibiting the operation of a laundry in wooden buildings without the "consent of the Board of Supervisors." The Board had denied applications from Yick Wo and some 200 of 230 Chinese who had been operating their laundries in their wooden buildings for upwards of 20 years, while it had approved the applications of 80 Caucasians and denied only one. The Court held the Board's action to have denied equal protection of the laws to Yick Wo, who had been jailed for operating a laundry in a wooden building without the Board's consent.

The Court's holding is squarely upon discriminatory administrative action, and does not reach the question whether the ordinance was unconstitutional.

> In the present cases, we are not obliged to reason from the probable to the actual; and pass upon the validity of the ordinances complained of as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration; for the cases present the ordinances in

> actual operation and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant the conclusion that, whatever may have been the intent of the ordinance as adopted, they are applied by the public authorities charged with their administration and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of . . . equal protection of the laws. *Yick Wo v. Hopkins*, at 373.

The language of the *Yick Wo* decision strongly suggests that if the alleged discrimination is in the administration of a facially non-discriminatory statute, it must be shown to be purposeful or intentional. The opinion speaks in terms of an evil eye and an unequal hand. Nothing in Mr. Babsaay's [*sic*: Manzano's] case suggests that.

In *Snowden v. Hughes*, 321 U.S. 1, 8 (1944), the Court states unequivocally:

> "The unequal administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

The Ninth Circuit and the other courts of appeals have repeatedly held that there must be a purpose to discriminate. *Williams v. Field*, 416 F.2d 283, 286 (9th Cir. 1969); *Hoffman v. Holden*, 268 F.2d 280, 290 (9th Cir. 2959); *United States v. Falk*, 479 F.2d 616, 619 (7th Cir. 1973) en banc; *Friedlander v. Cimino*, 520 F.2d 318, 320 (2nd Cir. 1975); *Hawkins v. Town of Shaw*, Mississippi, 461 F.2d 1171, 1173 (5th Cir. 1972); *Tollett v. Laman*, 497 F.2d 1233 (8th Cir. 1974); *Robinson v. McCorkle*, 462 F.2d 111 (3rd Cir. 1972).

In this case, it is clear that the withdrawal of the naturalization authority was not done *for the purpose* of discriminating against Filipino war veterans. The facts strongly indicate the contrary.

At page 18 of the deposition of former INS Commissioner Ugo Carusi, taken by Donald L. Ungar on February 24, 1974 in connection with the *68 Veterans* case, Mr. Ungar [*sic*: the examiner] asked:

> Q. Now, in withdrawing the designation of the examiner in the Philippines, was there ever any factor that entered into your consideration such as prejudice against the Philippine race or any type of conspiracy that you know of to keep these people from coming to the United States as Americans?

Mr. Carusi answered:

> A. No. If there had been, I wouldn't have countenanced it.

If the INS had harbored a purpose to deprive Filipino veterans of their naturalization, it is impossible to explain why the United States Consul in Manila was originally given the naturalization authority in August 1945. If the withdrawal of the naturalization authority in October 1945 was done with the purpose to discriminate against Filipinos, the restoration of the authority in August 1946 was a self-defeating act.

It cannot be argued that the effect on Filipinos was purposeful. Certainly there is no evidence to support such a finding, which is essential to a conclusion that the Executive Authority has violated the equal protection guarantee. Judge Renfrew glossed over this defect in the *68 Veterans* case by dealing with the case in terms of its involving an "inherently suspect" classification based on national origin. There are two errors in Judge Renfrew's application of this approach.

First, he disregarded the fact that designating the classification as "suspect" is merely the means to an end, deciding whether the classification is reasonably related to a legitimate government purpose. The Supreme Court's repeated admonitions that certain classifications will be subject to severe scrutiny mean that it will make an independent judgment on the "rational basis" question. For example, in *King v. Saddleback Junior College District,* 445 F.2d 932 (9th Cir. 1971), the Ninth Circuit Court upheld School Board regulations on the length of male students' hair. The Board had the statutory power to promulgate regulations to maintain order in the schools. The Board's premise was that long hair was disruptive of order, and the Court held that, given that premise, the hair-length regulation was a rational means of attaining order, a legitimate governmental purpose. The point of the case is that where the classification is not "suspect," the courts will not examine the soundness of the premise. If, however, the regulation had involved a "suspect" classification, the Court would have more closely examined the validity of the premise and the legitimacy of the governmental purpose. This is precisely what the Supreme Court did in *Hirabayashi v. U.S.*, 320 U.S. 81 (1943); *Korematsu v. U.S.*, 323 U.S. 214 (1944); *Ovama v. California,* 332 U.S. 633 (1948); *Takahashi v. Fish Commission,* 334 U.S. 410 (1948); *Graham v. Richardson,* 403 U.S. 365 (1971); *Sugarman v. Dougall,* 413 U.S. 634 (1973); and *In re Griffiths,* 413 U.S. 717 (1973). However, the facts of the instant case obviate the need for the "suspect classification" analysis because the distinction is clearly rational on its face. The INS did not maintain a naturalization authority in the only county [*sic*: country] which objected to it.

The second reason the "suspect classification" analysis is not appropriate in this case is, as we have stated, there was *no purpose* on the part of the INS to draw distinctions

disfavoring veterans of Philippine nationality. The only purpose is this case was the purpose of the Philippine Government to retain the finest of its male population. In the traditional "suspect classification" analysis, the first step is to ascertain the Government's purpose; the second is to determine whether this purpose is legitimate; the third is to determine what reason the Government gives for drawing the distinctions between classes of individuals; and the final step is to determine whether the classification bears a rational relation to the purpose. As applied to this case, this analysis breaks down at every step.

First, there was no purpose to exclude Filipinos from the benefits of the Act; thus there can be no issue of the legitimacy of such purpose. The INS did not single out Filipinos for disparate treatment; their government did. Since the INS did not draw the distinction, there can be no meaningful analysis whether it was a rational distinction for the INS to draw. Every case cited by Judge Renfrew involves a situation where the Legislature or Executive *actively undertook to establish* the suspect classification. It is only that context that the ordinary equal protection analysis is applicable. In this case, the analysis must stop when it is determined that the Government had no purpose to discriminate against Filipinos. This conclusion brings us full circle to the inevitable correctness of the rule of *Snowden v. Hughes,* supra, that where the alleged discrimination is in the execution rather than in the enactment of a statute, there must be proof that the alleged discrimination is intentional and purposeful. In this case there is no evidence of purposeful arbitrary discrimination; thus the Petitioner has not been deprived of due process by any discriminatory act of the United States Government. For this reason, there is no basis for granting the belated naturalization petition of a man who did nothing to seek naturalization in the Philippines before December 31, 1946.

The Court is also referred to *Olegario v. United States,* 629 F.2d 204 (2d Cir. 1980). Although this is a Second Circuit opinion, it is supportive of the Service position insofar as holding that the decision of the Government to withdraw the Naturalization Examiner was "justified in light of the express Federal interest in responding to concerns voiced by the Philippine Government." Having found the Government's action justified, the Court reversed the District Court's order granting naturalization to Olegario.

Pursuant to the provisions of section 335 of the Immigration and Nationality Act (8 U.S.C. 1446), I hereby make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT:

(A) The petitioner filed a petition for naturalization on April 14, 1983 under the provisions of Section 701 of the Nationality Act of 1940, as amended;

(B) The Petitioner is a Filipino national who served honorably on active duty with the United States military enlisting in the Philippines from July 1, 1944 until he was honorably discharged on March 2, 1946 in the Philippines;

(C) The Petitioner is not a lawful permanent resident of the United States;

(D) The Petitioner has offered no evidence to show that he made any inquiry in the Philippines about naturalization or applied therefor while serving on active duty;

(E) That the Petitioner did inquire concerning his naturalization in July 1946 after he had been discharged from the service and was therefore ineligible for naturalization;

(F) And that the law enabling the Petitioner to naturalize due to his military service expired on December 31, 1946.

CONCLUSIONS OF LAW:

The Petitioner is ineligible for naturalization under the provisions of section 701 of the Nationality Act of 1940, as amended, because of the decision of the United States Supreme Court in *INS v. Hibi*, 414 U.S. 5 (1973), and because of current section 310(e) of the Immigration and Nationality Act, as amended, (8 U.S.C. 1421(e)), notwithstanding the decision of the United States District Court, San Francisco, California in *Matter of Naturalization of 68 Filipino War Veterans*, 406 F.Supp 931 (N.D. Cal. 1975).

RECOMMENDATION:

I hereby recommend that the Petition for Naturalization of BONIFACIO LORENZANA MANZANO be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALAN S. RABINOWITZ
General Attorney, INS

5/11/84
Date

U.S. GOVERNMENT PRINTING OFFICE: 1987 – 181-453:40,000

OPPOSITION

BRIEF

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-2019

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER,

v.

BONIFACIO LORENZANA MANZANO,
RESPONDENT

BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT A. MAUTINO
Attorney for Respondent
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(619) 235-9176

QUESTION PRESENTED

Whether the court should grant the petition in this case in view of the Government's failure of proof below.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-2019

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER,

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BONIFACIO LORENZANA MANZANO,
RESPONDENT

BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PRELIMINARY STATEMENT

Manzano Case Not Identical to Pangilinan, No. 86-1992. Contrary to the Government's assertion, Petition For A Writ of Certiorari to the Court of Appeals for the Ninth Circuit (hereafter, Manzano Petition) at 6, the issues in Manzano are not identical to those involved in INS v. Pangilinan, No. 86-1992. There are some similarities, however. Manzano served honorably in the United States military forces in World War II, and, during the period of his active military service, he took no steps to apply for naturalization under the special war-time legislation. Thus, he can be considered a "Category II" veteran 1/, but the issues in his case are not completely identical with those in Pangilinan.

1/ The Government, the Courts and the respondent in this litigation have used a shorthand method of describing Filipino veterans of World War II. This method uses the term "Category I" veteran and "Category II" veteran. Deriving from the system set up in In re Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal., 1975), "Category I" refers to eligible veterans who tried to apply for naturalization before the expiration of the special war-time legislation on December 31, 1946. "Category II" refers to otherwise eligible veterans who took no steps to try to apply for naturalization during that period.

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

Although Manzano shares certain aspects in common with the Pangilinan respondents, his case is basically different from the case of those veterans in that the Government submitted no evidence whatsoever at trial to support its contentions in his case. Thus, while there was no argument on the fact that Government withdrawal of the naturalization examiner was peculiar to the Philippines, the Government produced no evidence to justify its discriminatory treatment of Filipinos. While the Pangilinan respondents stipulated on the evidence, Manzano was not a party to their agreement. The Government's attempts to use evidence from cases to which Manzano was not a party should not be allowed. If the Government chooses, for whatever reasons, not to submit the evidence in its possession, it should suffer the consequences and lose its case for failure of proof.

As to the issue of statutory construction, Manzano, through counsel, has conferred with counsel in Pangilinan, and he joins the arguments set out in their brief to be filed with the Court.

ARGUMENT

I. Government Submitted No Evidence in Manzano Case.

A. Failure of proof; Government on notice to produce evidence.

Manzano's case was heard on June 4, 1984 in the United States District Court for the Southern District of California, Hon. Gordon Thompson, Jr., Judge presiding. Well before that date, Manzano put the Government on written notice that its assertions of reasons and facts for discriminatory treatment of Filipino veterans would be contested and that Manzano expected the Government to produce its evidence (Appendix 1 attached hereto).

At the trial on June 4, 1984, the Government introduced no evidence whatsoever.

In mathematical terms, the sum total of the Government's evidence was: ZERO. In spite of this fact, the District Court found against Manzano, and he appealed. The Government's lack of evidence was raised again on appeal, and the Court of Appeals specifically asked for oral argument on this point. (Appendix 2, attached hereto). However, because of the decision of the Court of Appeals in Pangilinan v. INS, 796 F. 2d 1091 (9th Cir. 1986), cert. pending sub nom INS v. Pangilinan, No. 86-1992, the Court of Appeals did not reach this argument and decided Manzano on the same ground as Pangilinan. Manzano Petition, Appendix A at (1a).

While the parties agreed on the fact that the Government had withdrawn the naturalization examiner from the Philippines in 1945 and that such withdrawal was peculiar to the Philippines, they did not agree on the Government's reasons therefore. Fourteen of the respondents in Pangilinan stipulated with the Government on the evidence, Barretto

v. U.S., 694 F. 2d 603, 605 (9th Cir., 1982), reversed sub nom INS v. Litonjua, 465 U.S. 1001 (1984), Pangilinan Petition at 8, and the Government has lodged in that case copies of a total of twenty-three pieces of evidence. Lodging to Pangilinan Petition at 473-547. Not one of the items produced by the Government in its Pangilinan Lodging was submitted to the District Court in Manzano's case.

Since Filipinos were by statute nationals of the United States owing full allegiance to this nation until Philippine independence on July 4, 1946, 48 Stat. 456, Sec. 2(a)(1), they were protected by certain fundamental rights, including the Fifth Amendment. Balzac v. Porto Rico, 258 U.S. 298, 312-313 (1922). Moreover, it is clear that the Fifth Amendment encompasses the right to equal protection of the laws. Bolling v. Sharpe, 347 U.S. 497 (1954).

Discrimination based upon national origin violates this constitutional right to equal

protection unless it is shown to be necessary to the vindication of a compelling governmental interest. Graham v. Richardson, 403 U.S. 365, 371-72 (1971). The parties conceded that the withdrawal of an official empowered to administer naturalization pursuant to the war-time statute was peculiar to the Philippines, but the Government presented no evidence purporting to justify such discrimination. It follows therefrom that the Government failed to meet its burden of showing that the differential treatment was necessary to the achievement of a compelling governmental interest.

Thus, Manzano was denied the equal protection of the laws guaranteed by the due process clause of the Fifth Amendment, and the proper remedy is the allowance of naturalization pursuant to the Nationality Act of 1940, as amended by the Second War Powers Act, P.L. 77-507, 56 Stat. 182, March 28,

1942; INS v. Pangilinan, 796 F. 2d 1091 (9th Cir. 1986). Likewise, the Government produced no evidence to justify its position on the issue of statutory construction, and the same result should obtain. Id.

B. Government attempts implied collateral estoppel on the evidence. In United States v. Mendoza, 464 U.S. 154 (1984), this Court held that the Government could not be collaterally estopped in a civil case from relitigating, against a different party, an issue which it may have lost in a previous case. The Court recognized that the Government's position as a civil litigant was unique and that there were often good reasons for encouraging litigation on issues which may have been adversely decided against the Government in cases involving other parties. Id. at 163.

In Manzano's case, the Government seems to be proceeding under the assumption that it can rely on evidence submitted in other

cases to which Manzano was not a party, and, in some way, bind him to that evidence, which he has never had an opportunity to inspect or contest. The only general knowledge about what kind of evidence the Government may have in its possession is found in reported cases which have mentioned specific pieces of evidence. However, some items are mentioned in some reported decisions but not in others. Compare, for example, 68 Veterans, 406 F. Supp. 931, 936, 944 (4 items) with Olegario v. U.S., 629 F. 2d 204, 209, 210 (2nd Cir. 1980)(6 items), U.S. v. Mendoza, 672 F. 2d 1320, 1323 (9th Cir. 1982)(1 item) and INS v. Hibi, 475 F. 2d 7, 10 (9th Cir. 1973)(1 item).

Now the Government in Pangilinan has lodged with this Court what purports to be twenty-three pieces of evidence, some of which have never been mentioned before in any reported case. Pangilinan Lodging at pages 473-547. However, the Government now withholds at least two pieces of evidence which were

reported in 68 Veterans: (1) Memorandum from Paul McNutt, U.S. High Commissioner to the Philippine Islands, to Edward J. Shaughnessy, Special Assistant to the Commissioner of INS, November 6, 1945 (406 F. Supp. 931, 935-6, n. 4) and (2) Memorandum from Edward J. Shaughnessy to Ugo Carusi, November 9, 1945 (Id. at 943-4, n. 22). It is likely that other evidence also exists which has not been presented. Where, for example, is any communication to High Commissioner McNutt asking for his views on the matter? How do we know whether the Government has only selected those items which support its case and ignored any relevant items of evidence which tend to support the veterans' cases?

Manzano's point here is that, with all of this evidence supposedly in the Government's possession, why did the Government submit a total of zero pieces of evidence in his case and then try to bind him to the evidentiary findings of other courts in other cases to which he was not a party? The Government

did not even request that any of the several judges who have heard this case take judicial notice, although such a request would most likely have been rejected.

The central issue in Manzano's case, as well as in the cases of most of the veterans, is the Government's alleged justification for its admitted actions to deprive eligible Filipinos of their legal rights to apply or not to apply for naturalization during the 1945-46 period. The more critical an issue to a particular litigant's position, the more reluctant courts have been to determine the issue by taking judicial notice. TWA, Inc. v. Hughes, 308 F. Supp. 679 (S.D.N.Y. 1969), modified on other grounds, 449 F. 2nd 51, reversed on other grounds 409 U.S. 363, rehearing denied 410 U.S. 975. In any case, there was no judicial notice taken of the Government's alleged evidence in Manzano's case.

Manzano should be entitled to

naturalization because the Government failed to prove its case when it had ample opportunity to do so. In this respect, his case differs from that of the Pangilinan respondents, and the Government's Petition in his case should be denied.

II. Pangilinan Issue in Manzano's Case.

Insofar as the Pangilinan issue of statutory construction can have any relevance to Manzano's case, in view of the Government's failure of proof, Manzano, through counsel, has conferred with counsel in Pangilinan. Manzano joins the arguments of Pangilinan's counsel to be set out in their brief to the Court in that case.

CONCLUSION

In view of the Government's total failure to prove its case, the Petition for a Writ of Certiorari should be denied. A rule that the Government must submit its evidence in those cases which it chooses to litigate works no undue hardship upon the Government in future cases. As to the Pangilinan issue of statutory

construction, the denial of the petition in Manzano's case does not prejudice the Government as it can still have its argument in the Pangilinan litigation.

The petition should be denied.

Respectfully submitted,

Robert A. Mautino
Attorney for Respondent

APPENDIX 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PETITION FOR NATURALIZATION)	Petition No. 41490
)	
of)	BRIEF IN SUPPORT
)	OF PETITION FOR
BONIFACIO LORENZANA MANZANO)	NATURALIZATION
)	

* * * * * * * *

[Material Omitted]

B. The Petitioner does not agree with the Government's assertions that the withdrawal of the naturalization authority was prompted by foreign policy concerns or by any concerns expressed by the Philippine Commonwealth government. Id. at, for example, pages 4, 14-16, 19, 21, 24. The Government's brief is not evidence, and the Petitioner expects the Government to produce its evidence in this regard.

* * * * * * * *

[Material Omitted]

III. GOVERNMENT'S FOREIGN POLICY ARGUMENT MUST FAIL EVEN IF IT SUCCEEDS IN ESTABLISHING ITS CASE

The Government's brief in this case (Findings, supra) establishes clearly that the Government's major argument here will be that its actions in withdrawing its naturalization examiner from the Philippines were taken for foreign policy reasons. That same argument was rejected in 68 Veterans, supra, and sustained in Olegario, supra. A glance at the reported decisions in those two cases indicates that a great deal of evidence was presented to the respective courts for their consideration of the Government's argument regarding "foreign policy". In the present case, no such evidence has been made available to this point.

The Government here does not want to be bound by the legal conclusions in 68 Veterans, which it lost. However, it wishes the Petitioner to be bound to the factual

determinations of the courts in other cases. The unfairness of this position is obvious. If the Government wishes to establish its contentions in this case, it should be required to submit its evidence like any other litigant. If, however, for whatever reason, the Government chooses not to submit its evidence, it should be prepared to accept the consequences.

* * * * * * * * *

[Material Omitted]

Respectfully submitted,

Dated: 5/24/84 /s/Robert A. Mautino
Robert A. Mautino
Attorney for Petitioner

APPENDIX 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT
[November 30, 1984]

In the Matter of Petition of:	No. 84-6031
BONIFACIO LORENZANA MANZANO	DC# Petition: 41490
BONIFACIO LORENZANA MANZANO, Petitioner,	Southern California
vs.	ORDER
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	

Counsel shall be prepared to argue whether this court may properly take judicial notice on appeal of the Attorney General's alleged foreign policy reasons for withdrawing the special examiner from the Philippines. Specifically, the parties should address whether the alleged request by the Philippine Government and the alleged reasons for the Attorney General's response are susceptible

of judicial notice.

FOR THE COURT:

PHILLIP B. WINBERRY
Clerk of Court

By: /s/Robert T. Ritter
Roger T. Ritter
Senior Deputy Clerk

PETITIONER'S

BRIEF

(a) (5)

Nos. 86-1992 and 86-2019

In the Supreme Court of the United States

OCTOBER TERM, 1987

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ANTOLIN PUNSALAN PANGILINAN, ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

BONIFACIO LORENZANA MANZANO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

CHARLES FRIED
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66 pp

QUESTION PRESENTED

Whether Philippine veterans of World War II, whose opportunity to apply for American citizenship under greatly liberalized conditions expired in December 1946, are nonetheless currently entitled to citizenship because, during a nine-month period between October 1945 and August 1946, there was no designated examiner stationed in the Philippines to whom they could have applied for naturalization.

PARTIES TO THE PROCEEDINGS

Petitioner is the Immigration and Naturalization Service. Respondents are Antolin Punsalan Pangilinan, Panfilo Jabalde, Fidel Zosimo Usi Canilao, Antonio Patdo Tantay, Arcadio Revilla Nepomuceno, Dionisio Vallejos Lucas, Oliver Juan Posadas, Vicente Miranda Belizario, Rodolfo De Jesus Batac, Pedro Dumlao Ponciano, Cesar Jocson Ascalon, Winifredo Pableo Bello, Bonifacio Leoncio Zarcal, Benjamin Natividad Bonus, Mario Valderrama Litonjua, and Bonifacio Lorenzana Manzano.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1992

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

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BONIFACIO LORENZANA MANZANO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court in No. 86-1992 (Pet. App. 1a-24a[1]) is reported at 796 F.2d 1091. The dissenting opinion from the denial of rehearing en banc in No. 86-1992 (Pet. App. 29a-41a) is reported at 809 F.2d 1449. The original opinion of the court of appeals in No. 86-1992 (Pet. App. 42a-53a) is reported at 694 F.2d 603. The opinion of the court of appeals in No. 86-2019 (Manzano Pet. App. 1a-3a) is

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 86-1992. "Manzano Pet. App." refers to the appendix to the petition in No. 86-2019. "Lodging" refers to the lodging submitted to the Clerk with the petition in No. 86-1992.

unreported. The opinion of one district court (Pet. App. 54a-59a) is reported at 511 F. Supp. 630. The opinions of the other district courts (Pet. App. 60a-61a; Manzano Pet. App. 8a-10a) are unreported. The findings and recommendations of the designated naturalization examiners (Pet. App. 62a-127a, 130a-160a; Manzano Pet. App. 11a-38a) are likewise unreported.[2]

JURISDICTION

The judgments of the court of appeals in No. 86-1992 (Pet. App. 25a-27a) were entered on August 11, 1986. A petition for rehearing was denied on February 13, 1987 (Pet. App. 28a-29a). On May 5, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari in No. 86-1992 to and including June 13, 1987, and the petition was filed on June 12, 1987. The judgment of the court of appeals in No. 86-2019 (Manzano Pet. App. 4a) was entered on September 26, 1986. A petition for rehearing was denied on February 19, 1987

[2] This case involves three lawsuits: two appeals (both part of No. 86-1992) that were consolidated in the court of appeals (*Pangilinan* v. *INS* (caption below) and *Litonjua* v. *INS* (caption below)) and a third case (*INS* v. *Manzano*, No. 86-2019) that was consolidated by this Court with No. 86-1992. One naturalization examiner was assigned to handle the cases of all 14 respondents in *Pangilinan*. His legal analysis is essentially identical in each case. Accordingly, we have reproduced the complete findings and recommendations in only one of the cases, that of respondent Pangilinan (Pet. App. 62a-88a). With respect to the other 13 *Pangilinan* respondents, we have reproduced only individualized excerpts (*id.* at 89a-127a), but we have also lodged with the Clerk of the Court copies of the unedited versions (Lodging 1-325). In addition, we have lodged with the Clerk one set of appendices to the findings and conclusions in the *Pangilinan* cases (*id.* at 464-547), which are identical in each of the 14 cases. We have also reproduced the unedited findings and recommendations of the naturalization examiners in *Litonjua* (Pet. App. 130a-160a) and *Manzano* (Manzano Pet. App. 11a-38a).

(Manzano Pet. App. 5a). On May 5, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari in No. 86-2019 to and including June 19, 1987, and the petition was filed on that date. Both petitions were granted, and the cases consolidated by this Court, on October 5, 1987. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 701, 702, and 705 of the Nationality Act of 1940 (the 1940 Act), as amended by the Second War Powers Act, 1942, ch. 199, § 1001, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002, and 1005, and Section 310(e) of the Immigration and Nationality Act of 1952 (the 1952 Act), 8 U.S.C. 1421(e), are reproduced in the appendix to the petition in No. 86-1992 (Pet. App. 161a-163a) and in the appendix to this brief. Pertinent sections of three other statutory provisions are also set out in the appendix to this brief: the First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 14; the Act of June 1, 1948, ch. 360, 62 Stat. 281 (amending the 1940 Act); and Section 329(a) and (d) of the 1952 Act, 8 U.S.C. 1440(a) and (d).

STATEMENT

Respondents are 16 Philippine veterans of World War II who, between June 1978 and April 1983, filed petitions for naturalization under Section 701 of the Nationality Act of 1940 (the 1940 Act), 8 U.S.C. (Supp. V 1945) 1001, as added by the Second War Powers Act, 1942, ch. 199, § 1001, 56 Stat 182 (Pet. App. 62a-127a, 130a-160a; Manzano Pet. App. 37a; Lodging 326-463).[3] Under that Section, aliens who served in the American Armed Forces

[3] The 1940 Act was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 280.

during World War II were permitted to apply for citizenship under greatly liberalized conditions. As part of the program, alien servicemen on active duty outside the United States were allowed under Section 702 of the Act to obtain naturalization overseas by applying to special examiners designated by the Commissioner of Immigration and Naturalization (the Commissioner) (8 U.S.C. (Supp. V 1945) 1002). As amended by Section 1(c)(1) of the Act of Dec. 28, 1945, ch. 590, 59 Stat. 658, Section 701 specified that any petition submitted thereunder had to be filed no later than December 31, 1946.[4]

[4] In a subsequent amendment to the 1940 Act, Act of June 1, 1948, ch. 360, 62 Stat. 281 (the 1948 Act), Congress again authorized certain members of the American Armed Forces to apply for citizenship under liberalized requirements. By its terms, the 1948 Act was inapplicable to respondents. Eligibility was limited by Section 1 to service personnel who were lawfully admitted to the United States for permanent residence after enlistment or who "at the time of enlistment or induction" were "in the United States or an outlying possession (including the Panama Canal Zone, but excluding the Philippine Islands)" (62 Stat. 282). Section 2 provided that the eligibility of any person who filed a timely petition for naturalization under Section 701 of the 1940 Act but whose application was still pending would be determined under the 1948 Act (62 Stat. 283).

In 1952, Congress passed comprehensive legislation relating to immigration and naturalization. Immigration and Nationality Act, 8 U.S.C. (& Supp. IV) 1101 *et seq.* (the 1952 Act). Under that Act, which is still in effect, Congress basically carried forward the provisions of the 1948 statute governing citizenship for military personnel. Section 329(a), 8 U.S.C. 1440(a), provides that, to be eligible for citizenship, the individual must have been located, at the time of enlistment or induction, "in the United States, the Canal Zone, American Samoa, or Swains Island" or he must have been lawfully admitted to the United States for permanent residence at any time subsequent to the enlistment or induction. Section 329(d), 8 U.S.C. 1440(d), provides that "[t]he eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under section 701 of the Nationality Act of 1940, as amended • • • and which is still pending on the effective date of this chapter, shall be determined in accordance with the provisions of this section." Respondents concede that they are ineligible for citizenship under the 1952 Act (see Pangilinan Br. in Opp. Cert. 12-13).

In 1961, Congress enacted Section 310(e), 8 U.S.C. 1421(e), which provides that "any" petition for naturalization filed after September 26, 1961, shall be determined in accordance with the 1952 Act.

Respondents made no effort to apply for (or even inquire about) overseas naturalization while on active duty in the Philippines (Pet. App. 4a-6a, 63a, 87a, 89a-129a, 131a-132a; Manzano Pet. App. 8a, 12a, 37a). Nor did they take legal action to enforce their alleged entitlement to citizenship under the 1940 Act until more than 30 years after the cutoff date. Nevertheless, the court of appeals ordered that all of them be granted citizenship.

1. a. The events leading to the present case began more than 40 years ago. In 1942, Congress amended the 1940 Act to provide liberalized conditions for the naturalization of aliens who served honorably in the United States Armed Forces during World War II. Section 701 exempted certain alien servicemen who served in areas outside the continental United States from various naturalization requirements, such as literacy in English and a period of residence in the United States. Section 702 provided for the overseas naturalization of persons serving in the United States Armed Forces who were eligible for naturalization under Section 701 but who were beyond the jurisdiction of the United States naturalization courts. Under Section 702, representatives designated by the Commissioner were authorized to receive petitions, conduct hearings, and grant naturalization outside the United States. Section 705 authorized the Commissioner, with the Attorney General's approval, to make such rules and regulations as were necessary to carry into effect the provisions of Sections 701-702. See *INS* v. *Hibi*, 414 U.S. 5, 6-7 (1973).

The great bulk of alien servicemen were naturalized by naturalization courts in this country, but thousands were naturalized pursuant to Section 702 by immigration officers traveling on rotation from post to post throughout England, Iceland, North Africa, and the islands of the Pacific.[5] The 1940 Act could not be carried out in the Philippines between 1942 and 1945 because of the Japanese occupation. Nonetheless, approximately 7000 Filipino service members were naturalized in places outside the Philippines.[6] See *Hibi*, 414 U.S. at 10 (Douglas, J., dissenting); *Olegario* v. *United States*, 629 F.2d 204, 209 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981); *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 935 (N.D. Cal. 1975) (*68 Filipinos*).

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[5] A large number of the overseas naturalizations were performed by one individual, Dr. Henry Hazard (Lodging 523). Hazard naturalized 6574 alien servicemen between 1943 and 1945 (*id.* at 543-544). Between 1942 and 1944, 80,062 alien servicemen were naturalized by naturalization courts in this country (*id.* at 545-547).

According to a War Department circular, consular officials were designated in various locations to serve as "representatives" (apparently meaning examiners) under Section 702 (Lodging 477). We have been unable to confirm the accuracy of that statement, and we have found no statistics suggesting that such officials in fact naturalized alien servicemen. The courts have repeatedly stated—apparently correctly (see Lodging 522-523 (testimony of former INS Commissioner Carusi))—that Section 702 was implemented in most parts of the world under a post-to-post system in which an official traveled from one location to another. See *Hibi*, 414 U.S. at 10 (Douglas, J., dissenting); *Olegario* v. *United States*, 629 F.2d 204, 209 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981); *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 935 (N.D. Cal. 1975). See also Pangilinan C.A. Reply Br. 17 (acknowledging "that other soldiers elsewhere may have had as little actual access as [respondents] to the naturalization official overseas").

[6] Between 1942 and 1944, 5919 Filipinos were naturalized by naturalization courts in this country (Lodging 545-547). Dr. Hazard naturalized 923 Filipinos at military posts outside the Philippines during his overseas visits (*id.* at 544).

Following the liberation of the Philippines by Allied Forces and the resolution of certain issues as to the applicability of Sections 701-702 to various Filipino servicemen,[7] the provisions of the 1940 Act were implemented in the Philippines. In early August 1945, the Immigration and Naturalization Service (INS) designated George Ennis, an American vice consul in Manila, to naturalize aliens pursuant to Section 702. The Philippine government subsequently expressed its concern to the State Department that the mass migration to this country of perhaps as many as 250,000 newly naturalized veterans would drain its soon-to-be independent country[8] of essential manpower and undermine post-war reconstruction efforts.[9]

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[7] One issue was whether service in the Philippine Commonwealth Army constituted service in the United States military forces for purposes of Section 701. A question existed because that army (which, with guerrilla units, was estimated at between approximately 166,000 and 270,000 men) was an arm of the Philippine government and was simply "call[ed] and order[ed] into the service of the armed forces of the United States" by a Presidential Order in 1941 (Lodging 482). In contrast, a much smaller unit known as the Philippine Scouts (consisting of about 6200 men) was a unit of the United States Army (see Lodging 506, 508). In 1945 the Attorney General determined that members of both Philippine units were covered by Section 701 (see *Olegario*, 629 F.2d at 209 n.3).

A second issue concerned the eligibility of Filipinos who had never resided in the United States. The Attorney General concluded that prior residence in the Philippines, then an American possession, satisfied the requirement of Section 701 that the applicant have been lawfully admitted into or otherwise entered "the United States, including its Territories and possessions." See *Olegario*, 629 F.2d at 209 n.3.

[8] The Philippines were scheduled to become an independent country on July 4, 1946. Philippine Independence Act of 1934, ch. 84, § 10(a), 48 Stat. 463.

[9] Although the Philippine government had apparently voiced concerns even prior to the designation of Ennis (see Lodging 503-504), those concerns took on significance only when that designation was

In September 1945, the Commissioner recommended to Attorney General Tom Clark that the problem be resolved by revoking Vice Consul Ennis's naturalization authority.[10] The Attorney General approved the recommendation, and naturalizations in the Philippines ceased in late October 1945 and did not begin again until nine months later, in August 1946. Pet. App. 3a, 44a; Lodging 502-506; *Olegario*, 629 F.2d at 209-210.[11]

In February 1946, Congress passed the First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 6 (Rescission Act). In that statute, Congress appropriated $200 million for the Philippine Army (60 Stat. 14). However, in so doing it also provided that, with

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actually made. At that point, the Philippine government reiterated its objections in informal discussions with the State Department (see *ibid.*), and those objections were passed on to the Attorney General. At the time both countries had substantial interests in resolving the matter in confidence. The Philippines were pursuing independence and wished to preserve their population without antagonizing it. The United States desired to eliminate a source of friction and potential embarrassment with a newly emerging nation whose friendship was of considerable importance to the post-war balance of power in the Pacific.

[10] The INS took the position that Section 702 authorized but did not mandate the designation of overseas examiners (Lodging 513).

[11] Members of Congress were apparently advised of the Attorney General's action but made no effort to alter the decision. A memorandum of October 19, 1945, to the INS Commissioner from his Special Assistant (Lodging 506-507), which discussed the revocation of naturalization authority, indicated that Senator Hayden of the Senate Committee on Territories and Insular Affairs had expressed interest in the problem of naturalizing Filipino veterans because of his fear that the eligibility of large numbers of Filipino servicemen for veterans' benefits would escalate such benefits to unacceptable levels. The memorandum further reflected that Senator Hayden had discussed the matter with Senator Russell, who was then chairman of the Senate Immigration Committee. While the memorandum does not explicitly state that those Senators were informed of the revocation of naturalization authority, it gives that impression.

certain exceptions not relevant here, service in the Philippine Army pursuant to the July 26, 1941, order of the President was "not [to] be deemed to be or to have been service in the military or naval forces of the United States or any component thereof for the purposes of any law of the United States conferring rights, privileges, or benefits upon any person by reason of the service of such person * * *" (*ibid.*).

Five months after the enactment of the Rescission Act, the INS took the position, based on that Act, that Filipinos serving in the Commonwealth Army were no longer eligible for naturalization because they failed to qualify under Section 701 (see Lodging 515-517).[12] The following month, in August 1946, the INS designated a new naturalization official for the Philippines, P.J. Phillips, who naturalized approximately 4000 Filipinos between August 1946 and the December 31, 1946, cutoff date. Pet. App. 3a; *Olegario*, 629 F.2d at 211.[13]

b. In the past two decades there has been a stream of litigation as a result of belated efforts by Filipino veterans to obtain naturalization under the 1940 Act. These veterans have asserted that they were denied statutory and constitutional rights as a result of the nine-month absence

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[12] Under that revised interpretation, Philippine Scouts, who enlisted directly into the armed forces of the United States, remained eligible under Section 701. The government maintained its revised position until 1957, when a district court held that the Rescission Act did not take away the naturalization privileges of members of the Philippine Commonwealth Army (*In re Munoz*, 156 F. Supp. 184 (N.D. Cal. 1957)). See note 44, *infra*; see generally *Olegario*, 629 F.2d at 209-210 & nn.3, 5.

[13] In light of the INS's revised interpretation, reinstating naturalization authority did not pose the serious threat of a manpower drain that had concerned the Philippine officials. As noted, the vast majority of Filipino servicemen were members of the Commonwealth Army. Of the 16 respondents in this case, 14 served in the Commonwealth Army or its guerrilla units (Pet. App. 63a, 90a, 93a, 99a, 102a, 105a, 108a, 111a, 114a, 117a, 120a, 123a, 126a; Manzano Pet. App. 8a).

of a naturalization examiner in the Philippines. Several of these prior Filipino veteran cases provide pertinent background for the present case.

In *INS* v. *Hibi*, 475 F.2d 7, rev'd, 414 U.S. 5 (1973), the Ninth Circuit held that the government was equitably estopped from arguing that Hibi, a Filipino veteran, should be denied naturalization based on the statute's expiration date. This Court summarily reversed, holding that the government's revocation of Ennis's authority and its failure fully to publicize the benefits available to Filipino veterans under the 1940 Act did not give rise to an estoppel against the government.

Two years later, in *68 Filipinos*, the district court granted the petitions for naturalization of numerous Filipino veterans. The court classified the veterans into three groups: (1) "Category I": those who made affirmative but unsuccessful attempts to file petitions for naturalization while on active duty in the Philippines; (2) "Category II": those who, like respondents, had not sought naturalization in a timely manner but who could have qualified had they done so; and (3) "Category III": those who were unable to establish that they had ever qualified under Sections 701-702. The court granted the petitions of the Category I and II veterans but denied those of the Category III veterans (406 F. Supp. at 936-951).[14]

The government appealed the district court's decision in *68 Filipinos* and filed a brief, but it later withdrew the appeal after a new administration took office. The government thereafter re-evaluated its position once again and

[14] With respect to the Category I veterans, the court held that their petitions should be treated as "constructively filed" and that the government was equitably estopped to contest the petitions because of its failure to process the applications (406 F. Supp. at 938-939). With respect to the Category II veterans, the court held that they were entitled to citizenship because the government's revocation of the vice consul's authority violated their due process rights (*id.* at 948-951).

decided that it would thereafter challenge the petitions of Category II veterans.[15] Subsequently, in a case involving a different Filipino veteran, the Ninth Circuit held that because the government had withdrawn its appeal in *68 Filipinos*, it was collaterally estopped from contesting petitions for naturalization of other Filipino veterans who were applying under Sections 701-702 of the 1940 Act. This Court unanimously reversed, holding that, under the facts presented, collateral estoppel did not apply against the government based on an earlier lawsuit brought by a different party. *United States* v. *Mendoza*, 464 U.S. 154 (1984), rev'g 672 F.2d 1320 (9th Cir. 1982).

2. a. The present cases represent the third phase of the attempts of Filipino veterans to obtain naturalization under statutory provisions that expired decades ago. All of the respondents except Litonjua and Manzano filed their petitions in the United States District Court for the Northern District of California. Those 14 respondents[16] stipulated with the government that their legal claims were identical to those of the Category II veterans in *68 Filipinos* (Pet. App. 4a, 45a, 128a), since they were all on active duty in

[15] Since the *68 Filipinos* case, the government has adopted a policy of not opposing naturalization petitions of Category I veterans. The government also adopted a "grandfather rule" whereby it acceded to the holding of *68 Filipinos* with respect to petitions for naturalization of Category II veterans that were filed prior to the government's withdrawal of its appeal in *68 Filipinos*. The reason for the grandfather rule was that some veterans had apparently reached an agreement with the INS to hold their claims in abeyance pending the outcome of the appeal in *68 Filipinos*. The government was concerned that there was an implicit promise to those veterans that it would be bound by the result in *68 Filipinos* and that the veterans may have relied on that promise to their detriment.

[16] The *Pangilinan* case involves 14 veterans (referred to collectively as the "*Pangilinan* respondents"). The cases of *Litonjua* and *Manzano* involve only a single veteran each. See note 2, *supra*.

the Philippines for at least part of the period between October 1945 and August 1946, when there was no designated examiner in the Philippines, and they had made no effort to apply for (or inquire about) overseas naturalization while they were eligible under Section 702. Indeed, most of them did not even learn about the availability of citizenship for World War II veterans under the 1940 Act until the late 1970s.[17] One naturalization examiner was designated to handle the cases of all of the *Pangilinan* respondents. Rejecting the reasoning of the district court in *68 Filipinos,* he recommended against naturalization.[18] On September 24, 1980, upon consideration of the examiner's recommendation and the Second

[17] Respondent Pangilinan claimed in his petition for naturalization that after his discharge he "inquired with the Veterans Administration in 1946 to become a U.S. citizen, but they told [him he] was not eligible" (Lodging 334). He later stipulated with the government that he was a Category II veteran (Pet. App. 128a), and the designated naturalization examiner found that Pangilinan "offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946" (*id.* at 63a). The other 13 *Pangilinan* veterans conceded in their petitions that they did not even learn of the availability of naturalization for veterans until *after* 1946. Specifically, respondents Canilao and Tantay first learned in 1947 that they could have applied for citizenship (Lodging 353, 362); respondents Ascalon and Zarcal first learned in 1948 (*id.* at 428, 448); respondent Jabalde first learned in 1976 (*id.* at 344); respondents Lucas, Batac, Ponciano, Bello, and Bonus first learned in 1977 (*id.* at 380, 408, 419, 439, 455); respondents Nepomuceno and Belizario first learned in 1978 (*id.* at 371, 398); and respondent Posadas first learned "a few years" prior to 1979 (*id.* at 389).

[18] Specifically, he concluded that: (1) the petitions of the *Pangilinan* respondents were barred by Section 310(e) of the 1952 Act, 8 U.S.C. 1421(e), which precludes naturalization under expired or superseded statutory provisions; (2) the claims were barred by laches and by the veterans' failure to show that they were injured by the absence of an examiner; (3) the claims raised nonjusticiable political questions because the Attorney General's actions involved issues of foreign

Circuit's *Olegario* decision,[19] the district court denied the petitions of the 14 respondents[20] in a single order (Pet. App. 60a-61a). Those cases were consolidated for purposes of appeal.

b. Respondent Litonjua filed his petition in the United States District Court for the Southern District of California. Litonjua, who served in the Philippines from May 1941 to April 1946 as a member of the United States Navy, made no effort to apply for naturalization while on active duty. He made preliminary efforts to obtain citizenship during a visit to the United States after his discharge, but did not complete the petition process prior to the cutoff date (Pet. App. 131a-132a).[21] The naturalization examiner

policy that were within the sole prerogative of the Executive Branch; (4) the veterans' due process claims were nonmeritorious; and (5) their claims were barred by *Hibi.* Pet. App. 67a-87a.

[19] In *Olegario,* the Second Circuit rejected a Filipino veteran's claim of entitlement to citizenship under Section 701, holding, inter alia, that the decision to revoke Vice Consul Ennis's authority for foreign policy reasons was properly within the discretion of the Executive Branch and was not barred by the 1940 Act.

[20] The district court actually ruled on and denied 17 petitions, but only 14 of the veterans filed appeals.

[21] Specifically, Litonjua alleged that he made inquiries at the INS during late July or early August of 1946 while in Seattle as a civilian employee of the United States Army Transport Service. He apparently submitted some documents, although the nature of those documents is unclear. In any event, although Litonjua was instructed by the INS not to leave the Seattle area without first notifying that office, he left Seattle on August 17, 1946, without following those instructions. Litonjua made no effort to contact the INS until he returned to Seattle in January 1947 and was informed that the naturalization program for veterans had expired. Litonjua then waited 31 years before filing a petition for naturalization. Pet. App. 132a-133a, 158a. The court of appeals held that Litonjua was entitled to relief as a Category II veteran and for that reason did not reach his claim that he should be treated as a Category I veteran even though he did not pursue naturalization while overseas (*id.* at 6a n.3; see also *id.* at 45a-46a n.3).

recommended that Litonjua's petition be denied, giving reasons similar to those given by the examiner in *Pangilinan* (Pet. App. 130a-160a). The district court agreed and denied Litonjua's naturalization petition on April 9, 1981 (*id.* at 54a-59a). Although it concluded that Litonjua's claim was not barred by the political question doctrine, laches, or this Court's *Hibi* decision, the court followed *Olegario* and held that the Attorney General's revocation of the vice consul's authority was proper under the 1940 Act (*id.* at 56a-59a).

c. Like Litonjua, respondent Manzano filed his petition in the United States District Court for the Southern District of California. And Manzano, like all of the other respondents, was not a Category I veteran (as that term was used in *68 Filipinos*) because he made no effort to apply for or inquire about overseas naturalization while on active duty in the Philippines (Manzano Pet. App. 8a, 12a, 37a). Manzano claims that in July 1946, after completing his service, he inquired at the American Embassy in the Philippines about the possibility of obtaining citizenship but was told that there was no longer anyone present to assist him (*id.* at 12a). Manzano then waited 37 years—until 1983—before applying for citizenship under the 1940 Act (*id.* at 11a).

The naturalization examiner recommended that Manzano's petition for naturalization be denied on several grounds (Manzano Pet. App. 11a-38a).[22] The district court agreed and denied the petition (*id.* at 8a-10a).[23]

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[22] Those grounds were essentially the same as those relied upon by the examiners in *Pangilinan* and *Litonjua* (Manzano Pet. App. 11a-38a).

[23] The court rejected the government's argument that Manzano's claim was barred by laches (Manzano Pet. App. 9a). Nonetheless, relying on the Second Circuit's decision in *Olegario*, it held that the Attorney General, in revoking the vice consul's naturalization authority, had acted within the scope of the 1940 Act (*id.* at 8a-9a).

3. The *Pangilinan* respondents and Litonjua filed appeals in 1980 and 1981, respectively, and the court of appeals consolidated those cases (No. 86-1992). Manzano's appeal (No. 86-2019), filed later, was assigned to a different panel, which decided the case based on the court's 1986 decision in No. 86-1992.

a. In No. 86-1992, the court of appeals applied its *Mendoza* decision, which had not yet been overturned by this Court (see page 11, *supra*), and reversed the two district courts on collateral estoppel grounds (Pet. App. 42a-53a). After this Court reversed the Ninth Circuit in *Mendoza*, it vacated the court of appeals' collateral estoppel judgments in the *Pangilinan* and *Litonjua* lawsuits (*INS* v. *Litonjua*, 465 U.S. 1001 (1984), rev'g *sub nom. Barretto* v. *United States*, 694 F.2d 603 (9th Cir. 1982)),[24] thus setting the stage for the current phase of the litigation.

b. On remand from this Court, the court of appeals in No. 86-1992 did not reach respondents' constitutional claims. Rather, it "avoid[ed] deciding this substantial constitutional question" (Pet. App. 20a) and instead held that the revocation of Vice Consul Ennis's naturalization authority violated the 1940 Act and that, as a consequence, belated naturalization was appropriate as an equitable remedy (*id.* at 11a-24a).

At the outset, the court concluded, with no elaboration, that this Court's *Hibi* decision was not relevant because respondents were "rais[ing] statutory and constitutional arguments neither presented to nor addressed by the Supreme Court in *Hibi*" (Pet. App. 11a).[25] On the issue

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[24] Veteran Barretto is no longer part of this litigation because the court of appeals granted him citizenship for reasons unique to his case (see Pet. App. 51a-53a).

[25] The court also rejected the government's arguments that the issue was a nonjusticiable political question, that 8 U.S.C. 1421(e) precluded respondents' naturalization, and that respondents' petitions were barred by laches (Pet. App. 7a-10a).

whether the Attorney General lawfully revoked the vice consul's naturalization authority, the court held that "there is little room for doubt" that the Attorney General's action was contrary to " 'the expressed will of Congress' " (*id.* at 16a (citation omitted)).[26] The court stated that the language of Sections 702 and 705 was "mandatory, not discretionary," and contained "no express or implied delegation of authority to the Attorney General to deny the benefits of the Act to eligible aliens for any reason" (Pet. App. 16a (footnote omitted)). The court therefore refused to "find an implied intent to defer to the Attorney General's judgment that benefits under the Act should be withheld from Filipinos in response to postwar manpower concerns expressed by Philippine officials" (*id.* at 17a).

The court acknowledged (Pet. App. 20a-21a) that its interpretation of the 1940 Act conflicts with the Second Circuit's holding in *Olegario* that the Attorney General's action was permissible under that Act. It concluded, however, that the Second Circuit's analysis is "unpersuasive" (*id.* at 21a), and it noted that *Olegario* was decided before this Court stated in *INS* v. *Miranda*, 459 U.S. 14 (1982), that "the Attorney General's 'error was clear' when he revoked [the vice consul's] naturalization authority in 1945" (Pet. App. 21a).[27]

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[26] The Court took the phrase "the expressed will of Congress" from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952), which stated that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb • • • ."

[27] In *Miranda*, the Court held that the government's 18-month delay in processing an application for adjustment of status did not give rise to a claim of estoppel. No issue involving citizenship for Filipino veterans was involved. In reaching its conclusion regarding Miranda's claim, the Court stated (459 U.S. at 18) that, "[u]nlike *Montana* [v. *Kennedy*, 366 U.S. 308 (1961)] and *Hibi*, where the Government's error was clear, the evidence that the Government failed to fulfill its duty in this case is at best questionable." See notes 34 & 38, *infra*.

The court then addressed the question whether it had power to remedy the Attorney General's "transgression" by granting respondents naturalization notwithstanding the untimeliness of their petitions (Pet. App. 22a). It stated that under "deep-rooted precepts of equity," a federal court has "broad remedial powers" and is authorized to " 'adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action' " (*id.* at 22a-23a (citation omitted)). In the court's view, because "[t]here [was] simply no other way to restore the lost opportunity for citizenship that Congress offered [Filipino veterans] as a just reward for their military service in World War II," granting naturalization to respondents was "the only effective remedy available to 'rectify the agency action taken' " (*id.* at 23a (citation omitted)).

d. After the court of appeals rendered its decision in No. 86-1992, the panel in No. 86-2019 entered its ruling (Manzano Pet. App. 1a-3a).[28] Characterizing the present case as "nearly identical" to *Pangilinan (id.* at 2a), the court reversed the district court and remanded "for reconsideration consistent with" that decision (*id.* at 3a).

e. The court in No. 86-1992 subsequently denied the government's petition for rehearing and suggestion for rehearing en banc, with Judge Kozinski, writing for himself and seven other judges, dissenting from the denial of en banc rehearing (Pet. App. 29a-41a). In disputing the panel's conclusion (*id.* at 20a) that the 1940 Act gave Philippine servicemen a "right" to citizenship, the dissenting judges agreed with the Second Circuit in *Olegario*

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[28] The panel in No. 86-2019 had previously entered an order withholding submission of the appeal pending the court of appeals' decision in *Pangilinan* and *Litonjua* (Manzano Pet. App. 7a). The order stated that submission was withheld "pending decision in *Barretto* v. *United States*, No. 80-4543" (Manzano Pet. App. 7a). No. 80-4543 is the court's docket number for *Pangilinan; Barretto* is the name under which the prior consolidated decision was issued and reported. See page 15 & note 24, *supra*.

that, at most, the statute provided such servicemen " 'with *an opportunity* to become • • • citizen[s].' " *Id.* at 30a (emphasis added by dissent (quoting *Olegario*, 629 F.2d at 224)). The dissent also agreed with *Olegario* that the statute gave the Attorney General "very broad discretion" in "implementing the naturalization program," and that foreign relations was "a proper concern of the executive branch" in the decision to revoke the naturalization examiner's authority (Pet. App. 32a).[29]

In addition, the dissent stated (Pet. App. 33a) that the panel had merely used a different label to achieve precisely what had already been rejected by this Court in *Hibi*. It also maintained that, even aside from the teachings of *Hibi*, the panel's invocation of equity power was erroneous. It noted that, while equity courts have broad discretion to fashion a remedy, such discretion only arises "*once a right has been established*" (*id.* at 35a (emphasis in original)). Equity courts, the dissent asserted, have no authority to "enforce rights denied by statute" (*id.* at 36a). It pointed out that respondents failed to meet the statutory criteria for citizenship because their petitions were untimely (*ibid.*). The dissent concluded (*id.* at 41a) that the panel had "stretch[ed] the court's equity powers far beyond previously accepted limits."

f. Because the government had filed for rehearing in *Pangilinan*, it also filed a protective petition for rehearing in Manzano's case. The panel in that case stayed the disposition of the rehearing petition pending the resolution of the petition in *Pangilinan* (Manzano Pet. App. 6a). After the court of appeals denied the petition in *Pangilinan* (Pet. App. 28a-29a), the panel denied rehearing in Manzano's case (Manzano Pet. App. 5a).

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[29] The dissent noted that the 1940 Act "speaks in mandatory terms only in describing the steps the naturalization petitioner must take in applying for citizenship," and that "[i]n all other respects it • • • speaks in the permissive, leaving it to the 'Commissioner, with the approval of the Attorney General,' to establish the procedures for implementing the Act" (Pet. App. 31a (quoting 1940 Act, § 705)).

SUMMARY OF ARGUMENT

A. This Court's decision in *Hibi* forecloses the court of appeals' holding that the Attorney General's revocation of the vice consul's naturalization authority violated the 1940 Act and that conferral of citizenship is appropriate as an equitable remedy. In reversing the Ninth Circuit in *Hibi*, this Court held that the revocation of the vice consul's naturalization authority (as well as the failure fully to publicize the benefits accorded by Sections 701 and 702) did not estop the government from asserting that citizenship should be denied on the basis of Section 701's cutoff date (414 U.S. at 8-9). In substance, the Court rejected the very relief again ordered by the court below.

The fact that the veteran in *Hibi* characterized his claim as "equitable estoppel" does not meaningfully distinguish that case from this one, in which respondents seek "a remedy as a matter of equity" (Pangilinan C.A. Supp. Br. (2/14/85) 3). When a litigant seeks to estop the government from enforcing a statutory provision against him, he is seeking to prevent the operation of the statute itself. This is particularly true with respect to naturalization statutes, since the ultimate determination whether an alien has met the necessary conditions is made by the courts, not by the Executive Branch. Thus, the necessary import of this Court's decision in *Hibi* is that the Attorney General's alleged violation of the 1940 Act—namely, his revocation of the vice consul's naturalization authority—does not provide a court with equitable authority to ignore current statutory requirements for citizenship and to grant naturalization on the basis of an expired statute.

In the present case, the court of appeals used a somewhat different label, but it reached precisely the conclusion rejected in *Hibi*. The court held that the revocation of the vice consul's naturalization authority violated the 1940 Act and that Section 701's cutoff date could therefore be disregarded as a matter of equity (Pet. App. 11a-24a).

As the dissenting judges below correctly observed (Pet. App. 33a), however, "[t]here is no meaningful difference between saying that the government is equitably estopped from raising the statutory cutoff date and disregarding the cutoff date as a matter of equity."

B. Even if the court of appeals could correctly have distinguished *Hibi*, it could not properly overcome two additional obstacles to its granting of citizenship to respondents. First, it had to conclude that the Attorney General's revocation of the vice consul's naturalization authority violated the 1940 Act (Pet. App. 11a-21a). Second, it had to rule that a court of equity has authority to order citizenship as a result of such violation (*id.* at 21a-23a). Neither holding can withstand scrutiny.

1. The 1940 Act gave the Attorney General considerable discretion in implementing the program for overseas naturalization. Congress did not specify where naturalization examiners must be sent, or for how long. The action at issue here—the revocation of the vice consul's naturalization authority—was undertaken in response to concerns expressed by Philippine officials that their newly emerging country would suffer a critical manpower drain if large numbers of Philippine servicemen were free to apply for American citizenship under liberalized conditions (see Pet. App. 3a). That action was within the Attorney General's discretion for three related reasons.

First, since the statute did not speak, either explicitly or implicitly, to the foreign policy issue facing him, his interpretation of the statute that he was assigned by Congress to administer is entitled to considerable deference. See *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 23-25 n.29 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984)). Second, because the Attorney General was acting in the area of foreign affairs, his actions must be viewed with even greater deference. See, *e.g.*,

Regan v. *Wald*, 468 U.S. 222, 242 (1984); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Third, Congress has since enacted various statutes that can only be read as supporting the Attorney General's action. Specifically, it passed two statutes subsequent to 1946 granting citizenship to World War II veterans, but it excluded persons, such as respondents, who enlisted or were inducted in the Philippines, and it made the exclusion retroactive to pending applications that had been timely filed under Section 701. Act of June 1, 1948, ch. 360, 62 Stat. 281; 1952 Act, § 329(a) and (d), 8 U.S.C. 1440(a) and (d). It also passed the Rescission Act in 1946, which provided, with certain exceptions not relevant here, that service in the Philippine Commonwealth Army did not constitute service in the United States Armed Forces for purposes of conferring rights or benefits. Congress's actions are thus fully consistent with the Attorney General's determination that he had authority to revoke the vice consul's naturalization authority for foreign policy reasons. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 687 (1981); *Zemel* v. *Rusk*, 381 U.S. 1, 12 (1965).

2. In any event, even if the Attorney General exceeded his authority under the 1940 Act, the court of appeals lacked authority to order equitable relief. In a series of statutes, Congress made clear that Section 701's special naturalization program ended as of December 31, 1946, and that Philippine veterans, such as respondents, would thereafter be ineligible for naturalization unless they qualified under current law. First, Section 701 itself specified that all applications had to be filed by December 31, 1946. Second, as noted above, in 1948 Congress adopted a new liberalized citizenship program, but it specifically excluded from eligibility servicemen, such as respondents, who enlisted or were inducted in the Philippines. Congress also provided in that statute that all

applications still pending under the 1940 Act were to be governed by the 1948 Act. The provisions of the 1948 Act were essentially carried forward into the 1952 Act as Section 329, 8 U.S.C. 1440, and respondents concede that they do not qualify for citizenship under the 1952 Act (Pangilinan Br. in Opp. Cert. 12-13). Finally, in 1961 Congress amended the 1952 Act by adding Section 310(e), 8 U.S.C. 1421(e), which provides that "any" naturalization petition filed after that date is to be heard and determined in accordance with the requirements of the 1952 Act. Since those statutes, by their terms, preclude present day naturalization under the 1940 Act, the court of appeals' decision violated the basic principle of equity that a court may not contravene the mandate of a statute. See, *e.g.*, *Hedges* v. *Dixon County*, 150 U.S. 182, 192 (1893); *Seguros Banvenez, S.A.* v. *S/S Oliver Drescher*, 761 F.2d 855, 863 (2d Cir. 1985). See also *Fedorenko* v. *United States*, 449 U.S. 490, 506, 516-518 (1981) (indicating that a court has no authority to disregard statutory requirements for citizenship).

3. Finally, even if the court of appeals had the authority to order equitable relief, it should not have done so here. A balancing of the equities—which the court of appeals improperly failed to undertake (see *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948))—plainly shows that equitable relief was inappropriate. To begin with, even if the Attorney General misjudged his authority to consider foreign policy concerns in carrying out the 1940 Act, his misjudgment cannot be characterized as egregious. On the other hand, respondents' allegation of injury is purely speculative, since they did not even know about the citizenship program while they were eligible for overseas naturalization. In addition, granting respondents' belated petitions would potentially open the way to similar requests by thousands of other Filipinos. At this late date,

naturalization examiners and courts would have difficulty assessing claims by Filipinos that they qualified for citizenship under the 1940 Act and that they would have applied had a naturalization examiner been available. Moreover, various family members of the veterans would be entitled to obtain visas, either on a "first preference" basis or without regard to quotas (see 8 U.S.C. 1151(b), 1153(a)(1)), thereby potentially distorting the immigration process established by Congress. Finally, respondents are not without recourse; if Congress should decide that Filipino war veterans are deserving of United States citizenship, it can enact appropriate legislation. It has refused to do so, however, for the past four decades.

ARGUMENT

RESPONDENTS ARE NOT ENTITLED TO CITIZENSHIP UNDER THE LONG-SINCE EXPIRED PROVISIONS OF THE NATIONALITY ACT OF 1940

Notwithstanding this Court's prior reversals in *Hibi* and *Mendoza*, the Ninth Circuit has, for the third time, ordered the naturalization of Philippine veterans of World War II under a statute that expired more than 40 years ago. Having unsuccessfully invoked the doctrines of equitable estoppel (*Hibi*) and collateral estoppel (*Mendoza*), it has turned this time to "the federal judiciary's traditional powers of equity" (Pet. App. 23a). The court first found "little room for doubt that the Attorney General's revocation of Vice Consul Ennis's authority was 'incompatible with the expressed will of Congress' " (*id.* at 16a (citations omitted)). It then concluded that "deep-rooted precepts of equity" enable it to order respondents' naturalization as "the only effective remedy available to 'rectify the agency action taken' " (*id.* at 23a (citation omitted)).

The court's latest analysis is even less defensible than its prior efforts. As the dissenting judges pointed out (Pet.

App. 35a, 39a), the court "proceed[ed] almost directly" from the invocation of its equity powers "to its conclusion that it can and must provide the relief [respondents] seek," acting on nothing more than "its conclusion that it has identified a problem and that it alone can provide an effective remedy." In holding that respondents are entitled to citizenship under the 1940 Act, the court of appeals committed what the dissenters aptly characterized (*id.* at 29a) as a "constellation of errors": it disregarded this Court's *Hibi* decision; it incorrectly held that the Attorney General's revocation of the vice consul's naturalization authority for foreign policy reasons contravened Congress's intent; and it acted contrary to basic principles of equity jurisprudence.

A. The Relief Ordered By The Court Of Appeals Is Foreclosed By *Hibi*

The court of appeals dismissed this Court's decision in *Hibi* as inapposite with the simple statement (Pet. App. 11a) that respondents "do not rely upon the doctrine of equitable estoppel. Rather they raise statutory and constitutional arguments neither presented to nor addressed by the Supreme Court in *Hibi*." However, as the dissenting judges below correctly observed (*id.* at 33a), while the panel "use[d] somewhat different language" in granting citizenship to respondents, the result "is precisely that rejected by [this] Court in *Hibi*."

In *Hibi* a Filipino veteran sought to estop the government "from alleging that the filing deadline in section 701 ha[d] passed or that 8 U.S.C. § 1421(e) preclude[d his] petition" (*INS* v. *Hibi*, 475 F.2d at 9).[30] The veteran

[30] The facts in the present case are in all relevant respects identical to those in *Hibi*. The only differences between the two cases concern length and nature of World War II service and the degree of untimeliness of the naturalization petitions. Those differences have no bearing on the equitable remedy that the court below granted to respondents; if anything, they place respondents in a worse equitable

contended that equitable relief was appropriate because the Attorney General violated the 1940 Act by revoking the vice consul's naturalization authority and by failing to notify him about the citizenship program (*id.* at 8, 10). The court of appeals agreed and held that Hibi should be granted citizenship under Section 701 notwithstanding that Section's December 31, 1946, cutoff date (*id.* at 10-11). This Court reversed, holding that the revocation of the vice consul's naturalization authority (as well as the failure fully to publicize the rights accorded by Sections 701 and 702) did not constitute "affirmative misconduct" that might warrant estopping the government "from denying citizenship" (414 U.S. at 8-9). The Court concluded its opinion by stating (*id.* at 9) unequivocally that "[r]espondent's effort to claim naturalization under a statute which by its terms had expired more than 20 years before he filed his lawsuit must therefore fail."

The mere fact that respondents have changed the label of the relief they seek from "equitable estoppel" to "a remedy as a matter of equity" (Pangilinan C.A. Supp. Br. (2/14/85) 3) does not distinguish this case from *Hibi*. As the dissenting judges observed (Pet. App. 33a), "[t]here is no meaningful difference between saying that the government is equitably estopped from raising the statutory cutoff date and disregarding the cutoff date as a matter of equity."

When a litigant seeks, as did Hibi, to estop the government from enforcing a statutory provision against him, it is the operation of the statute that he actually seeks to prevent. And if a statutory provision cannot be enforced, the public policy established by Congress in enacting that provision is undermined. It is for that reason that this Court

posture. Whereas Hibi filed his petition for naturalization in 1967 (414 U.S. at 5), the earliest petition in the present case was filed in 1978 (see page 3, *supra*).

in *Hibi* invoked the well-established principle that "the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress" (414 U.S. at 8). Furthermore, when a litigant is seeking naturalization, an estoppel claim is not in fact addressed solely to Executive Branch enforcement of a legislative provision, since the Executive Branch does not rule upon a naturalization petition. Petitions for naturalization are adjudicated by naturalization courts. The Executive—or, more specifically, the designated naturalization examiner—merely provides the court with a *non-binding* recommendation concerning the appropriate disposition of the citizenship application. See 8 U.S.C. 1446(b) and (d), 1447; *Tieri* v. *INS*, 457 F.2d 391, 392 (2d Cir. 1972).[31] Thus, while the veteran in *Hibi* alleged that "the Government was estopped from relying on the statutory time limit" of Section 701 (414 U.S. at 7), his real demand was for naturalization as an equitable remedy notwithstanding the cutoff date and his failure to meet present day requirements for citizenship. And this Court, in denying relief, based its decision not on the absence of any technical element of estoppel,[32] but on its conclusion that the Attorney General's action did not constitute affirmative misconduct.

Indeed, both the veteran in *Hibi* and the court of appeals in that case plainly understood that "equitable estoppel" was merely the label placed upon a more general request for equitable relief. In his opposition to the government's petition for a writ of certiorari, Hibi (who was represented by the lead counsel for 14 of the 16 respondents here) made substantially the same contentions

[31] In Hibi's case, for example, the designated examiner recommended against citizenship, but the district court rejected that recommendation and granted Hibi citizenship (see 414 U.S. at 5).

[32] The elements of estoppel are described in *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51, 59 (1984).

concerning the revocation of the vice consul's naturalization authority that respondents have urged (and the court below accepted) in the present case (Hibi Mem. in Opp. Cert. 3-7, *INS* v. *Hibi, supra*). He specifically disavowed any narrow or technical construction of his claim, arguing instead that "[e]quitable estoppel is only the name for a legal principle employed by the courts below to enforce [the] promise" of citizenship to alien servicemen, and that, "while the events of this case may be described in the traditional terminology of equitable estoppel, it is the overriding commands of justice and good conscience which make the difference" (*id.* at 12). Plainly, Hibi's contentions were not based on a narrow application of the traditional elements of estoppel.

Moreover, the reasoning of the court of appeals in *Hibi* is not meaningfully different from the court's reasoning in the present case. As in this case (Pet. App. 16a), the Ninth Circuit in *Hibi* first found that the Attorney General violated the 1940 Act. It held that Section 705 "was not discretionary" but instead "imposed a legal duty" upon the Attorney General "to make a representative available to naturalize non-citizen applicants while they were still serving in the armed forces" (475 F.2d at 10). It therefore held, as did the court here (see Pet. App. 21a-22a), that revocation of "the authority of the only representative who could have naturalized [Hibi] while he was still in the army" violated the "duty" of the Attorney General and the Commissioner "to carry into effect the purposes of section 702" (475 F.2d at 10).[33] The court then found, as did the court

[33] See also 475 F.2d at 11 (finding "no statutory language" that gave the Attorney General power to revoke "the authority of the only person designated to perform naturalizations in the Philippines"); compare Pet. App. 16a (footnote omitted) ("[T]he language of the statute • • • contains no express or implied delegation of authority to the Attorney General to deny the benefits of the Act to eligible aliens for any reason.").

below (Pet. App. 21a-23a), that the violation entitled the veteran to equitable relief, namely, citizenship. Specifically, the court in *Hibi* ruled that because the conduct of the Attorney General and the Commissioner "was in derogation of their duties to carry out an Act of Congress" (475 F.2d at 11), the government should be estopped from alleging that Section 701's cutoff date had passed or that Hibi's naturalization was precluded under the 1952 Act. In granting Hibi's petition, the court explained that its decision fell within a class of cases that have "invoke[d] equitable relief to permit one to obtain his rights of citizenship where those rights have been denied due to erroneous action on the part of administrative officials" (475 F.2d at 11). The reasoning of the Ninth Circuit in *Hibi* is thus, on all counts, analytically indistinguishable from its reasoning in the present case.

In sum, the necessary import of this Court's reversal of the Ninth Circuit in *Hibi*—and the Court's conclusion that Hibi's "effort to claim naturalization" under a long-since expired statute "must therefore fail" (414 U.S. at 9)—is that the Attorney General's revocation of the vice consul's naturalization authority does not provide a court with equitable authority to resurrect an expired statute and ignore current requirements for obtaining citizenship. That holding is dispositive in this case, and the court of appeals has offered no persuasive reason for failing to comply with it.[34] In finding *Hibi* inapposite, the court of appeals

[34] Respondents are no more successful than the court of appeals in their efforts to distinguish *Hibi*. In the court of appeals, they stated (Pangilinan C.A. Supp. Br. (2/14/85) 7-8) that their statutory argument was not controlled by *Hibi* because (1) *Hibi* preceded this Court's decision in *Miranda*, 459 U.S. at 18, in which the Court stated that in *Hibi*, "the Government's error was clear" (see page 16 & note 27, *supra*); and (2) *Hibi* preceded the government's decision not to appeal the district court's decision in *68 Filipinos* (see pages 10-11, *supra*). Those arguments are without merit. In *Miranda*, this Court in no way suggested that *Hibi* was wrongly decided; to the contrary, it

was, in the words of the dissenters (Pet. App. 33a), merely "substitut[ing] words for concepts."

B. The Court Of Appeals Had No Basis For Ordering Equitable Relief

The court of appeals' holding that *Hibi* was inapposite was only the first of three barriers that it had to overcome

reaffirmed that the Attorney General's conduct, even if error, provided no basis for equitably estopping the government. 459 U.S. at 18-19. Moreover, as discussed below (see note 38, *infra*), we believe that the court of appeals and respondents have read too much into the Court's reference in *Miranda* to the government conduct at issue in *Hibi*. Similarly, the government's decision not to appeal in *68 Filipinos* is simply irrelevant to whether *Hibi* is controlling. Respondents' argument is nothing more than a restatement of the collateral estoppel argument rejected by this Court in *United States* v. *Mendoza*, *supra* (see page 11, *supra*).

In this Court, respondents have offered a third ground for distinguishing *Hibi* (Pangilinan Br. in Opp. Cert. 11): that under this Court's decision in *Lyng* v. *Payne*, 476 U.S. 926 (1986)—a case not relied upon by the panel—the fact that a remedy resembles estoppel is "irrelevant" because respondents are not asserting estoppel. Contrary to their contention, however, *Payne* does not give respondents such an easy escape from the Court's holding in *Hibi*. In *Payne*, the Court merely stated that a litigant cannot be denied a remedy that is clearly afforded him *by statute* simply because the relief he seeks resembles equitable estoppel and he fails to meet the latter's more stringent requirements (476 U.S. at 935-937). The claim in *Payne*—which this Court ultimately rejected on the merits—was that the Secretary of Agriculture failed to give adequate notice of the availability of loans under a disaster relief program and that the plaintiffs were therefore entitled to relief under the Administrative Procedure Act, 5 U.S.C. 551 *et seq*. Here, by contrast, the court below did not base its remedy on a specific provision enacted by Congress; rather it invoked general equitable principles to provide relief that was *prohibited* by statute (see pages 41-42, *infra*). Nothing in *Payne* suggests that, in the absence of a statutory remedy, an equitable claim can be successively presented, based on the same asserted government misconduct, by merely requesting estoppel under the more general label of "equitable relief."

in order to grant citizenship to respondents. It also had to find that the Attorney General's revocation of the vice consul's naturalization authority contravened Congress's intent in enacting Sections 701-705 (Pet. App. 11a-21a), and that, in light of that violation, awarding citizenship to respondents is within the power of a court of equity (*id.* at 21a-23a). In our view, the court of appeals erred on both scores. Accordingly, even if *Hibi* were not dispositive, the court of appeals still had no basis for granting respondents citizenship.

1. The Attorney General's Revocation Of The Vice Consul's Naturalization Authority Did Not Violate The 1940 Act

The court of appeals held that the Attorney General's revocation of the vice consul's naturalization authority violated the 1940 Act. In finding that his conduct "thwarted the will of Congress" (Pet. App. 20a), the court reasoned that (1) servicemen in the Philippines were entitled to overseas naturalization, (2) the statute gave the Attorney General no discretion to deny the benefits of the statute to any eligible serviceman, even for foreign policy reasons, and (3) by revoking the vice consul's naturalization authority, the Attorney General made it impossible for Filipino servicemen to avail themselves of the program (*id.* at 11a-21a).

The court's reasoning is seriously flawed. As we shall now show, Congress gave the Attorney General the responsibility for implementing Sections 701 and 702, and his actions with respect to the Philippines were lawful for three reasons. First, his decision is entitled to deference because he was construing a statute that he was charged by Congress to administer, and the issue facing him had not been addressed either in the terms of the Act or in its legislative history. Second, the Attorney General's decision is entitled to even greater deference because he was

responding to foreign policy concerns, an area in which courts are especially reluctant to second-guess the Executive Branch. Finally, Congress has never disapproved of the Attorney General's actions; in fact, it has taken several legislative steps that have implicitly ratified them. Taken together, these grounds provide a compelling basis for upholding the Attorney General's action.

a. The citizenship program established by Sections 701-702 gave the Attorney General and the Commissioner great responsibility and, correspondingly, considerable discretion. Section 705 provided that the Commissioner, with the Attorney General's approval, "shall prescribe and furnish such forms, and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this chapter." As the dissenters correctly noted (Pet. App. 31a), "Section 702 of the Act speaks in mandatory terms only in describing the steps the naturalization petitioner must take in applying for citizenship. • • • In all other respects the statute speaks in the permissive," leaving it to the INS Commissioner, with the Attorney General's approval, to implement the Act.[33] Specifically, the Act nowhere specifies where naturalization examiners must be sent, or for how long. Instead, the broad discretion given to the Attorney General and the Commissioner in 1942 under Sections 701-702 was consistent with their overall authority under the 1940 Act for administering the naturalization laws and for making the necessary rules and regulations. See 8 U.S.C. (1940 ed.) 727(a) and (b).

In implementing Sections 701 and 702, the Attorney General was faced with a variety of questions involving the

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[33] For example, since no mandatory procedures, schedules, or timetables were prescribed, the Attorney General and the Commissioner were free to adopt a post-to-post rotation system for examiners, even though that system did not provide continuous availability of a naturalization examiner. See note 5, *supra*; *Olegario*, 629 F.2d at 226.

scope of coverage and the manner of implementation. In considering the foreign policy decision that he had to make in September 1945, it is illuminating to understand the decisions that confronted him in initially implementing the program in the Philippines.

When the Philippines were liberated in 1945, the Attorney General had to decide whether Congress intended Sections 701-702 to apply to Filipinos who had entered service in the Philippines, primarily as members of the Commonwealth Army (see note 7, *supra*). The benefits of those Sections were available only to servicemen serving "in the military or naval forces of the United States" (1940 Act, § 701). Members of the Philippine Commonwealth Army, however, were not members of the United States Armed Forces as such; rather, they were members of a unit that was called and ordered into the service of our armed forces in July 1941 by Presidential Order. See note 7, *supra*. It was therefore unclear whether such servicemen were eligible for overseas naturalization. In addition, the statute applied only to noncitizens who, at the time of enlistment or induction, were "residents" of the United States who had been "lawfully admitted into" or otherwise entered "the United States, including its Territories and possessions" (1940 Act, § 701). The statute did not specify whether the Philippines, which were soon to become an independent nation, were included within those provisions. Moreover, there appears to be nothing in the legislative history that clarifies either of these statutory ambiguities.[16]

[16] We have found no indication that Congress specifically considered these matters when it enacted Sections 701-702. The absence of explicit reference to the Philippines in those Sections was in contrast to the predecessor statute applicable to World War I veterans, which made clear that residence in the Philippines was deemed residence within the United States for purposes of that statute. See Act of May 9, 1918, ch. 69, § 1, 40 Stat. 542. Because of the thousands of individuals who would be affected if the statute applied to members of the Commonwealth Army (see note 7, *supra*), one would expect that Congress would have been more specific had it contemplated that the statute was to apply to such servicemen.

In addition, two major purposes of Sections 701-702 were arguably inapplicable to members of the Commonwealth Army. One purpose was to encourage and reward enlistments by aliens into our armed forces (see, *e.g.*, 88 Cong. Rec. 1643 (1942) (remarks of Rep. Dickstein); *id.* at 1797-1798 (remarks of Rep. Celler)). Philippine servicemen, however—particularly those serving in their own national army—were fighting primarily to ensure their own country's independence from Japanese aggression, and that independence was presumably to be their main reward (see note 44, *infra*). A second purpose was to give alien servicemen from enemy or enemy-occupied countries U.S. citizenship to protect them, if captured, from being treated as traitors or illegal combatants (see, *e.g.*, 88 Cong. Rec. 1797 (1942) (remarks of Rep. Celler)). However, that purpose appeared inapplicable to Filipinos because they were U.S. nationals, not aliens. See Philippine Independence Act of 1934, ch. 84, § 2(a)(1), 48 Stat. 456 (Independence Act); see generally 8 U.S.C. (1940 ed.) 501(b) (general definition of "national"); but cf. Independence Act, § 8(a)(1), 48 Stat. 462 (citizens of the Philippines were "considered as if they were aliens" for immigration purposes and were therefore subject to quota and visa restrictions).

Moreover, in contrast to Sections 701-702, another part of the same statute referred specifically to the Philippines. See Second War Powers Act, 1942, ch. 199, § 301, 56 Stat. 179-180. In addition, a provision of Section 702, as originally enacted, was inconsistent with application of the statute in the Philippines. As originally enacted, Section 702 provided that the record of overseas naturalization proceedings and a copy of the certificate of citizenship were to be forwarded for filing to the clerk of a naturalization court "in the district in which the petitioner is a resident" (§ 1001, 56 Stat. 183). Compliance with that provision would have been impossible in the Philippines, since there were no naturalization courts there. See generally 1940 Act, § 301(a), 8 U.S.C. (1940 ed.) 701(a). That provision was changed in 1944 to permit filing of the record "in the district designated by the petitioner." Act of Dec. 22, 1944, ch. 662, § 2, 58 Stat. 887. See Lodging 466 & n.95 (reproducing both versions of Section 702). However, that change was apparently made not to include Filipinos but rather as "a convenience for the soldier," who might want his citizenship "recorded in some court other than the court in whose jurisdiction the place of his residence was located at the time of his induction." S. Rep. 1232, 78th Cong., 2d Sess. 2 (1944).

Eventually, after considerable deliberation and analysis on the part of his subordinates (see Lodging 481-497), the Attorney General exercised his interpretative discretion and decided to extend the naturalization opportunity to all Philippine servicemen. That decision was not mandated by the terms of the statute, and it would have been entirely reasonable for him to have reached the opposite conclusion. On the other hand, the decision was permissible under a reasonable and generous interpretation of the statute.

b. The concerns of the Philippine government that the naturalization program would result in a manpower drain and therefore undermine post-war reconstruction efforts required the Attorney General to make a considerably different determination concerning congressional intent. The question at that point was whether Congress would want him to conduct the naturalization program on Philippine soil if to do so would be detrimental to our future relations with the Philippine government (see Lodging 504). Like his initial decision that the Act applied to the Philippines, his subsequent decision to revoke the vice consul's naturalization authority for foreign policy reasons was also within his statutory discretion. This was true for three related reasons.

First, as with his initial decision, he was acting in an area where the statute was silent. Just as Congress gave no clear indication whether the overseas naturalization program was to be applied in the Philippines, there was nothing in the statute to suggest that maintenance of the program in a foreign country was mandatory notwithstanding impediments or problems that might arise, such as the objections of that country's officials.[17] Put another way, the administration of the overseas naturalization

[17] Indeed, Congress's silence on whether the program was to apply in the Philippines in the first place gave the Attorney General even greater discretion in resolving the foreign policy issue that arose there.

program was left to the Attorney General; Congress did not specify the circumstances in which naturalization authority should be designated in a country or the circumstances in which it could be revoked. Consequently, " 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.' " *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 24 n.29 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984)); see also *Lukhard* v. *Reed*, No. 85-1358 (Apr. 22, 1987), slip op. 7 n.3 (plurality opinion) (discussing *Chevron*); *INS* v. *Miranda*, 459 U.S. at 19 (citations omitted) (noting that "the INS is the agency primarily charged by Congress to implement the public policy underlying [the immigration laws]" and that, accordingly, "[a]ppropriate deference must be accorded its decisions").

Second, because the decision confronting the Attorney General was one involving foreign policy, the deference that a court must give is even greater than that required for a purely domestic decision.[18] This Court has stated that

[18] The court of appeals, in holding that the Attorney General's actions were not justified as an exercise of foreign policy discretion, gave several reasons, all of which are erroneous. First, it relied heavily on a comment by this Court in *Miranda*, 459 U.S. at 18, that in *Hibi*, "the Government's error was clear" (see Pet. App. 16a, 21a). See page 16 & note 27, *supra*. As the dissenters observed, however, "such heavy reliance on a stray remark made by the Court in an unrelated context by way of illustrating an entirely different point is misplaced. It is inconceivable that the Court resolved this important and difficult question in such an off-hand manner in a case where it was not argued, briefed or even at issue." Pet. App. 32a.

Second, the court noted (Pet. App. 18a n.12) that no one "with responsibility for foreign affairs participated" in the revocation decision. But the court erred in suggesting that only officials possessing formal responsibility for foreign affairs are entitled to make decisions affecting foreign policy. See, *e.g.*, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950); *Olegario*, 629 F.2d

"[m]atters relating 'to the conduct of foreign relations • • • are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.' " *Regan* v. *Wald*, 468 U.S. 222, 242 (1984) (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)).[39] This principle is particularly relevant to

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at 232.

Third, the court indicated (Pet. App. 18a) that the Philippines were not a proper subject for the exercise of foreign policy discretion because they were a territory in 1945 and thus under congressional regulation under Art. IV, § 3, Cl. 2 of the Constitution. But the independence of the Philippines was imminent, and the Attorney General's decision was clearly made in contemplation of relations with a soon-to-be independent nation.

Finally, the court erred (Pet. App. 18a) in drawing support from the fact that Congress, with the approval of Philippine officials, authorized the recruitment of 50,000 Filipinos to serve in our postwar occupation forces. Armed Forces Voluntary Recruitment Act of 1945, ch. 393, § 14, 59 Stat. 543. There is a significant difference between conferring U.S. citizenship on Filipino servicemen (resulting in a permanent loss of manpower to the Philippines) and the temporary loss of manpower resulting from service in the occupation forces in Japan. Indeed, members of Congress and Philippine officials contemplated that the Philippines would benefit by later having trained servicemen as the nucleus for a Philippine army. See *Second Supplemental Surplus Appropriation Rescission Bill, 1946: Hearings on H.R. 5604 Before the Subcomm. of the Senate Comm. on Appropriations*, 79th Cong., 2d Sess. 32 (1946) (remarks of Sen. Hayden) [hereinafter *1946 Hearings*]. See also *Olegario*, 629 F.2d at 227.

[39] Accord, *e.g.*, *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (foreign policy decisionmaking is subject to "the very delicate, plenary and exclusive power of the President" and "does not require as a basis for its exercise an act of Congress • • •"); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (explaining why courts should not second-guess sensitive foreign policy decisions of the President); see also *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965) (noting "the changeable and explosive nature" of foreign relations and "the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature").

immigration and naturalization matters. As this Court has recognized (*Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976) (footnote omitted)), "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."[40]

Because of the Executive's broad authority over foreign affairs, Congress need not expressly authorize every action taken. Thus, Congress's "silence is not to be equated with Congressional disapproval." *Haig* v. *Agee*, 453 U.S. 280, 291 (1981) (footnote omitted). Accord, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 678 (1981). In a variety of circumstances, this Court has upheld Executive action taken on foreign policy grounds even in the absence of explicit congressional authorization.[41] Thus, because the

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[40] Accord, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. at 588-589 (footnote omitted) (indicating that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations" and that such matters are "largely immune from judicial inquiry or interference"); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950) (citations omitted) (noting that the regulation of immigration is "inherent in the executive power to control the foreign affairs of the nation").

[41] See, *e.g.*, *Dames & Moore*, 453 U.S. at 654 (upholding executive agreement ending Iranian hostage crisis; portion of agreement suspending claims against Iran pending in U.S. courts upheld despite lack of explicit statutory authorization in light of past congressional acquiescence in similar settlement authority); *Agee*, 453 U.S. at 280 (upholding Executive's revocation of passport on national security grounds despite lack of explicit statutory authorization in light of congressional acquiescence in administrative construction of statute); *Zemel* v. *Rusk*, 381 U.S. 1 (1965) (upholding Secretary of State's refusal to validate passports for travel to Cuba based on general statutory authority to grant and issue passports and on Congress's failure, in enacting other passport-related legislation, to

Attorney General's decision involved a foreign policy matter, his action is entitled to even greater deference than that given to an Executive official who is implementing a grant of statutory authority in a purely domestic context.[42]

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correct the Executive's longstanding interpretation of the statute). See also *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986) (upholding Secretary of Commerce's decision that applicable statutes did not compel him to certify that Japan had failed to comply with international whaling quotas); *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (upholding regulation requiring Iranian natives who were here for post-secondary education to supply certain information to immigration authorities; court relied upon Attorney General's "broad authority" under the immigration statute), cert. denied, 446 U.S. 957 (1980).

In *Olegario*, the Second Circuit applied these principles of deference to the Executive in foreign affairs in concluding that the Attorney General's revocation of the vice consul's naturalization authority did not violate Sections 701-702. It noted (629 F.2d at 226 (citation omitted)) that "Congress's silence * * * 'on a subject about which no one had suggested a need to speak' " should not be construed to deprive the Executive Branch of the power "to consider the foreign affairs ramifications of a particular mode of enforcement and to suspend implementation to avoid a confrontation." Rather, the court concluded (*id.* at 227), the authority granted to the Executive Branch to implement Sections 701-702 without specific guidelines or restrictions "was sufficient to permit the executive to exercise some discretion when confronted with a seemingly delicate foreign affairs matter."

[42] The reasons for not second-guessing the foreign policy decisions of the Executive Branch apply *a fortiori* when a court is passing judgment more than 40 years after the fact. It would impose a serious chilling effect on our relations with foreign governments if our courts could easily invalidate Executive foreign policy decisions made decades earlier. Moreover, it is far too easy for a court, many years later – faced with a record that is necessarily imperfect because of the passage of time – to minimize the difficult and sensitive issues involved. Contrary to the court of appeals' approach (Pet. App. 8a n.6), the proper inquiry is whether a court, reviewing this case *in 1945*,

Finally, the justification for second-guessing the Executive's actions is weakest where, as in this case, Congress has implicitly ratified those actions. This Court, in previously upholding Executive action involving foreign policy, has given considerable weight to Congress's failure to object to such action when enacting subsequent legislation in the same subject area. See, *e.g.*, *Dames & Moore*, 453 U.S. at 682 n.10, 687-688; *Agee*, 453 U.S. at 296-301; *Zemel* v. *Rusk*, 381 U.S. 1, 12 (1965). Here, as in those cases, the Court is "not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority." *Dames & Moore*, 453 U.S. at 688. See generally *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Indeed, Congress has, at every turn, taken actions that are fully consistent with the revocation of the vice consul's naturalization authority.[43] Thus, in 1946, it passed the Rescission Act, which provided that service in the Commonwealth Army while it was called into the United States Army was, with certain enumerated exceptions not relevant here, not to be "deemed to be or to have been service in the military or naval forces of the United States" for the purposes of any law "conferring rights, privileges, or

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would properly have enjoined the Attorney General from revoking the vice consul's naturalization authority notwithstanding the pleas from Philippine officials. Unless a court should clearly have done so then – and would have been unquestionably correct in doing so – there can be no basis for a judgment 40 years later that the Attorney General's action was error.

[43] By the same token, it has not expressed disapproval of the Attorney General's action. As noted (see note 11, *supra*), an October 1945 memorandum suggests that at least two key Senators, Hayden and Russell, were informed of the Attorney General's action. Yet, no legislative efforts were made to reverse that decision. Moreover, Senator Russell expressed the view on the Senate floor in 1945 that Filipinos could not obtain citizenship without coming to the United States. No one questioned or disapproved of that statement. See 91 Cong. Rec. 12325 (1945).

benefits" by reason of service in the United States armed forces (60 Stat. 14). In the words of Senator Hayden, one of its co-authors, the provision "cancels any right which soldiers in the Philippine Army *may* have had to become citizens of the United States under the Nationality Act of 1940, as amended * * *." *Second Supplemental Surplus Appropriation Rescission Bill, 1946: Hearings on H.R. 5604 Before the Subcomm. of the Senate Comm. on Appropriations*, 79th Cong., 2d Sess. 60 (1946) (emphasis added) [hereinafter *1946 Hearings*].[44] Two years later, Congress passed a new statute offering citizenship to servicemen under liberalized conditions. Act of June 1, 1948, ch. 360, 62 Stat. 281 (the 1948 Act). Instead of repudiating the Attorney General's decision, however, it made clear that servicemen who enlisted in the Philippines were in-

[44] Senator Hayden described the rationale of the legislation as follows (*1946 Hearings* 60):

> * * * It was the view of the committee that the approximately 200,000 Filipinos who first and last served in that army did so because they fervently desired freedom for their country and not with the idea of acquiring the right to go to another country.
>
> That army consisted of 200,000 of the best citizens of the Philippines, who, to a large extent, hold the future of the islands in their hands. It would be the worst kind of public policy practically to invite them to leave their homes, where their position as patriots is recognized, and come to the United States, where, as immigrants, they would have to begin at the very bottom of the economic ladder to make their way upward. In the end it would be doing no favor to hold out such an inducement to leave the land they love and for which they fought so valiantly.

The court that decided *In re Munoz*, 156 F. Supp. 184 (N.D. Cal. 1957)—which held that the Rescission Act was not intended by Congress to affect the rights and privileges accorded by the naturalization laws (see note 12, *supra*)—apparently was not advised by either side of Senator Hayden's statements. The court relied solely on legislative history of a post-Rescission Act statute that made clear that the Rescission Act was not intended to exclude Filipinos from the benefits of the Missing Persons Act, ch. 166, 56 Stat. 143 (see 156 F. Supp. at 186). No similar clarifying legislation was enacted with respect to the naturalization of Filipino veterans.

eligible for that benefit—even if they made timely applications that were still pending—unless they later became lawful permanent residents of the United States.[45] When the present immigration statute was enacted in 1952, Congress carried forward the citizenship program for servicemen contained in the 1948 Act. 8 U.S.C. 1440(a) and (d). Again, Congress did not grant citizenship to individuals such as respondents; indeed, respondents concede that they are ineligible under the 1952 Act (see Pangilinan Br. in Opp. Cert. 12-13).

Congress's actions are thus entirely consistent with our submission that the Attorney General's conduct did not undermine the intent underlying Sections 701-702. The court therefore erred in concluding that "there is little room for doubt" that the revocation of the vice consul's naturalization authority was " 'incompatible with the expressed will of Congress' " (Pet. App. 16a (citations omitted)).

2. The Court Of Appeals' Invocation Of Equitable Authority Contravenes Congress's Intent, In Violation Of Basic Principles Of Equity

Even if the court of appeals were correct in characterizing the revocation of the vice consul's naturalization authority as "error" (Pet. App. 23a), it would nonetheless possess no authority to require the naturalization of respondents under the expired provisions of Section 701. Their naturalization would directly violate the commands of a series of statutes. First, Section 701 itself specified

[45] Section 1 provided that an alien serviceman was eligible for naturalization, inter alia, if "at the time of enlistment or induction [he] shall have been in the United States or an outlying possession (including the Panama Canal Zone, *but excluding the Philippine Islands*)" (62 Stat. 282 (emphasis added)). Section 2 provided that "[t]he eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under Section 701 of the Nationality Act of 1940 * * * and which is still pending on the date of approval of this Act, shall be determined in accordance with section [1]" (62 Stat. 283).

that all petitions thereunder had to be filed by December 31, 1946. Second, as noted above, in 1948 Congress adopted a new liberalized citizenship program, but it specifically excluded from eligibility individuals, such as respondents, who enlisted or were inducted in the Philippines; that exclusion was made retroactive to persons who applied for citizenship under Section 701 on or before December 31, 1946, but whose applications were still pending in 1948. The provisions of the 1948 Act were essentially carried forward into the 1952 Act as Section 329, 8 U.S.C. 1440. Section 329(a) limits current naturalization based on World War II military service to individuals who, at the time of enlistment or induction, were "in the United States, the Canal Zone, American Samoa, or Swains Island," or who, subsequent to enlistment, became lawful permanent residents of the United States. And Section 329(d) applies that limitation to still-pending applications that were timely filed pursuant to Section 701. Finally, in 1961 Congress amended the 1952 Act by passing Section 310(e), 8 U.S.C. 1421(e), which provides that "any" petition filed after the date of its enactment is to be heard and determined in accordance with the requirements of the 1952 Act.[46] These statutes make clear that a court has no authority to grant citizenship under the long-since expired provisions of the 1940 Act.

In ignoring the December 31, 1946, cutoff date and Congress's clear directive that citizenship requirements be addressed solely under current law, the court of appeals purported to be following "deep-rooted precepts of

[46] Section 310(e) was enacted because, in Congress's view, " '[t]he administration of two nationality laws simultaneously is cumbersome, inefficient, and unfair to other applicants for naturalization.' " *United States* v. *Pasion*, 524 F.2d 249, 252 (9th Cir. 1975) (quoting legislative history). Specifically, Congress acted in order to overrule various cases that had held that the 1952 Act did not take away benefits afforded under the 1940 Act. See generally *Olegario*, 629 F.2d at 211-212, 219-220.

equity" (Pet. App. 23a). What the court overlooked, however, was that its authority to order relief, "equitable" or other, was circumscribed by an elaborate statutory scheme governing naturalization. Even if a court of equity were completely free to act in the absence of any law to the contrary, its "flexibility" (see *id.* at 22a) must necessarily stop where the legislature has spoken, unless, of course, the legislation is itself unconstitutional—a contention that is not, and could not be, made in this case. Here, Congress has set forth detailed requirements that courts must follow in ruling on naturalization petitions. As the dissenting judges recognized (*id.* at 36a), Congress's intent must be carried out, regardless of whether the judiciary is sitting as a court of law or a court of equity.

The principle that a court of equity may not disregard the mandate of a statute is surely one of the most "deep-rooted precepts of equity." This Court stated almost a century ago that "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Hedges* v. *Dixon County*, 150 U.S. 182, 192 (1893); accord, *e.g.*, *Thompson* v. *Allen County*, 115 U.S. 550, 555 (1885) (noting that a court may not grant a remedy that extends beyond what the law allows); *Rees* v. *City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873) ("A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law • • •.").[47] Further-

[47] See also *Seguros Banvenez, S.A.* v. *S/S Oliver Drescher*, 761 F.2d 855, 863 (2d Cir. 1985) (citations omitted) (pertinent inquiry is whether invocation of equitable authority " 'comport[s] to and remain[s] compatible with the prevailing legislative intent' "); *Wirtz* v. *Chase*, 400 F.2d 665, 670 (6th Cir. 1968) (citation omitted) (" 'The maxim [equity follows the law] is strictly applicable whenever the rights of the parties are clearly defined and established by law.' "); *Colonial Trust Co.* v. *Goggin*, 230 F.2d 634, 637 (9th Cir. 1955) (citation omitted) (" 'Neither a fiction nor a maxim may nullify a statute.' "); *United States* v. *Killoren*, 119 F.2d 364, 366 (8th Cir.) (citations omitted) (" 'The plain mandate of the law cannot be set aside because of considerations which may appeal to referee or judge as

more, that principle applies *a fortiori* in the naturalization context. This Court has repeatedly made clear that there is "no power • • • vested in the naturalization court to dispense with" any substantive requirement for naturalization. *United States* v. *Ness*, 245 U.S. 319, 324 (1917). Accordingly, " '[o]nce it has been determined that a person does not qualify for citizenship, • • • the district court has no discretion to ignore the defect and grant citizenship.' " *Fedorenko* v. *United States*, 449 U.S. 490, 517 (1981) (citation omitted). Accord, *e.g.*, *United States* v. *Ginsberg*, 243 U.S. 472, 474 (1917).[48]

There can be no doubt that the court of appeals violated these basic principles of equity. It ordered citizenship for respondents even though they cannot meet current statutory requirements for citizenship.[49] Moreover, the court's action can in no way be viewed as carrying out Congress's intent. Since favorable disposition of petitions that had been *timely* filed by Philippine servicemen under Section 701 was precluded if the petitions had not been adjudicated prior to the effective date of the 1948 Act, Congress could hardly be thought to have intended or expected that courts would grant naturalization decades later to veterans who, like respondents, did not even know about the program while they were eligible.

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falling within general principles of equity jurisprudence.' "), cert. denied, 314 U.S. 640 (1941).

[48] While this Court in *Hibi* left open the possibility that the government might be estopped from enforcing a requirement for citizenship if it engaged in affirmative misconduct, the Court concluded that the very conduct at issue in the present case—the revocation of the vice consul's naturalization authority—was *not* affirmative misconduct. Thus, any conceivable exception to the principles set forth in *Ness*, *Fedorenko*, and *Ginsberg* would not apply here.

[49] Indeed, since respondents did not attempt to apply for or make inquiry about overseas naturalization while they were eligible under Section 702 (see pages 11-12, 13, 14, *supra*), they cannot even argue that but for the Attorney General's actions they would have complied with all of the requirements of the 1940 Act.

3. A Balancing Of The Equities Establishes That Equitable Relief Is Inappropriate

The court's invocation of equitable authority is erroneous for yet another reason. As the dissenters noted (Pet. App. 33a), the court totally failed to balance the equities before ordering relief. Had it done so, it would have been compelled to deny relief. Accordingly, even if the court of appeals had the *power* to order equitable relief, it should not have done so in this case.

This Court has made clear that equitable relief is not required as a matter of course whenever a violation of rights is found. Rather, "[i]t is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief." *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948); see also *Amoco Production Co.* v. *Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 9; *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944); *Meredith* v. *Winter Haven*, 320 U.S. 228, 235 (1943). See generally D. Dobbs, *Remedies* § 2.4, at 52 (1973). Moreover, courts should be especially cautious in ordering equitable relief "where governmental action is involved" (*Eccles*, 333 U.S. at 431).

Here, equitable considerations weigh heavily against granting respondents citizenship. To grant them citizenship, it is necessary to disregard several statutory provisions (see pages 41-42, *supra*) that render them ineligible. And as this Court has recognized, "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51, 60 (1984). See also *Hibi*, 414 U.S. at 8. This is simply not a case—if, indeed, there ever is one—in which enforcement of the law (and thus compliance with the law) should be estopped.

In the first place, the revocation of the vice consul's naturalization authority was prompted by sensitive foreign

policy considerations. Even if the Attorney General misjudged his authority to consider foreign policy concerns in executing Sections 701-702, his misjudgment can hardly be characterized as egregious.[50]

In addition, respondents' claim that they were injured by the Attorney General's action is entirely speculative, since they did not even know about the program while they were eligible, let alone inquire about or attempt to apply for citizenship.[51] It is sheer conjecture to conclude that, had the examiner been present, word would have made its

[50] See *Hibi*, 414 U.S. at 8-9 (Attorney General's actions did not constitute affirmative misconduct); *Santiago* v. *INS*, 526 F.2d 488, 496 (9th Cir. 1975) (en banc) (Choy, J., dissenting) (explaining *Hibi* as a case in which the Attorney General's "decisions were so patently of the type committed to the executive branch" that, "[r]egardless of whether the Government's conduct constituted an abuse of discretion," the Supreme Court "was extremely reluctant to nullify them over 20 years later in order to relieve one individual instance of hardship"), cert. denied, 425 U.S. 971 (1976); Comment, *Estoppel Against the Government*, 1976 Utah L. Rev. 371, 381-382 (noting that the veteran in *Hibi* "could show almost no equities in his favor which required the Government to be estopped," whereas "the Government's arguments against estoppel were strong" because of the foreign policy considerations underlying the Attorney General's decision).

[51] It is fundamental that courts should not order equitable relief "unless the need for [such] relief is clear, not remote or speculative." *Eccles*, 333 U.S. at 431. See also *Berenyi* v. *District Director*, 385 U.S. 630, 637 (1967) (where doubt exists concerning granting of citizenship, it should be resolved in favor of the United States); *United States* v. *Manzi*, 276 U.S. 463, 467 (1928) (same). The concerns that caution against the granting of equitable relief when the claim is speculative are very similar to those reflected in this Court's standing decisions. See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737, 759 (1984) (holding that "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury [were] far too weak for the chain as a whole to sustain respondents' standing"); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 165-168 (1972) (denying standing to black plaintiff to challenge a private club's discriminatory membership policies, where he did not claim that he had applied for and been denied membership in that club).

way to respondents that they could obtain United States citizenship under liberalized conditions. Indeed, an examiner was present in the Philippines for three months between August 1945 and October 1945, while all of the respondents were on active duty there (see Pet. App. 63a, 90a, 93a, 96a, 99a, 102a, 105a, 108a, 111a, 114a, 117a, 120a, 123a, 126a, 131a; Manzano Pet. App. 8a), yet none of them learned about the availability of citizenship under Sections 701 and 702.[52] Similarly, respondents cannot show that, but for the revocation of Vice Consul Ennis's authority, there would have been an examiner in place in the Philippines during the entire time that they were on active duty. Even the court of appeals recognized (Pet. App. 13a) that the 1940 Act did not "mandate[] the Attorney General to make naturalization examiners continuously available to alien servicemen wherever they may be stationed."[53] In fact, it is doubtful that the revocation left Philippine servicemen in a worse position over the long

[52] Nothing in the 1940 Act required that every eligible member of the armed forces be given personal notice of his eligibility. A War Department circular (No. 382) issued September 21, 1944, set forth the policy of the Army that non-citizens should be notified of their right to apply for citizenship at the time of induction and upon arrival at their first duty station. But the vast majority of respondents enlisted months or even years before that procedure was implemented (see Pet. App. 63a, 90a, 93a, 99a, 102a, 105a, 108a, 114a, 117a, 120a, 123a, 126a, 131a; Manzano Pet. App. 37a). Moreover, that procedure was inapplicable to the Philippines; rather, as stated in paragraph four of the circular, it was part of "[t]he general procedure to accomplish naturalization of noncitizens serving in continental United States, Alaska, Hawaii, Puerto Rico, or the Virgin Islands of the United States * * *." See Lodging 473-480 (reproducing circular). In any event, the court of appeals did not base its decision on the denial of any right of respondents to receive personal notice of the program.

[53] The court's emphasis (Pet. App. 6a, 11a) on the *nine-month* absence of an examiner in the Philippines (between October 1945 and August 1946) is, however, highly misleading. Not a single respondent was on active duty in the Philippines during the entire time that there was no examiner there (see *id.* at 63a, 90a, 93a, 96a, 99a, 102a, 105a,

run than alien servicemen in many other locations. Respondents, of course, had no opportunity to be naturalized in the Philippines during the period when there was no examiner there. However, they had an *uninterrupted* opportunity for naturalization during the three months that the vice consul possessed authority. This compared quite favorably to the merely *periodic* opportunity that was apparently available to alien servicemen in various other parts of the world. See note 5, *supra*.[54]

Furthermore, respondents are seeking to revive statutory provisions that expired more than 30 years before they filed their petitions.[55] Granting their belated petitions

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108a, 111a, 114a, 117a, 120a, 123a, 126a, 131a; Manzano Pet. App. 37a). Indeed, several of the respondents left the service—and were therefore ineligible for overseas naturalization—before even half of that nine-month period had passed. See, *e.g.*, Pet. App. 111a (Batac: left service in December 1945); *id.* at 93a (Canilao: left service in February 1946); *id.* at 99a (Nepomuceno: left service in February 1946). Under the Ninth Circuit's opinion, a veteran who was on active duty even *one day* when there was no examiner would be eligible for belated citizenship, even though there was a full-time examiner for three months before the revocation of the vice consul's naturalization authority. See *id.* at 52a-53a (court observed that a veteran on duty in the Philippines for even nine days in which there was no examiner would be entitled to citizenship).

[54] A court cannot properly ignore these causation problems by stating, as the court of appeals did (Pet. App. 20a), that the 1940 Act gave respondents a *right* to citizenship. Otherwise, every alien serviceman from World War II who desires citizenship could come to court today and claim his "right," whether he knew about the program or not. As the Second Circuit held in *Olegario* (629 F.2d at 223-224), Sections 701-702 did not grant "a vested right to citizenship," but merely provided a "mechanism" which extended an "opportunity" to apply for overseas naturalization under liberalized requirements.

[55] Because respondents waited so long, there is a strong argument that they are guilty of laches. See generally *Landsdale* v. *Smith*, 106 U.S. 391, 392 (1882); *Conagra, Inc.* v. *Singleton*, 743 F.2d 1508, 1517 (11th Cir. 1984). This is true not only of those who knew of the program in the late 1940s, but also those who did not actually learn about it until the 1970s (see note 17, *supra*). See generally *Community Health Services, Inc.*, 467 U.S. at 63 ("[T]hose who deal with the government

would open the way to similar requests by thousands of other Filipino veterans (or those claiming to be veterans).[56] In many cases, at this late date, naturalization examiners and the courts would have great difficulty in assessing the applicants' claims that they qualified under Sections 701-702 and that they would have sought naturalization back in 1945 or 1946 had an examiner been stationed in the Philippines during the period in question.[57]

Moreover, the naturalization of respondents and those similarly situated would have a spillover effect. Once the veterans obtain citizenship, their spouses and minor children would be entitled to visas without regard to quotas. In addition, the unmarried adult children of the veterans would be able to obtain "first preference" visas, thus possibly placing them ahead of other Filipinos awaiting visas under the quota system. See 8 U.S.C.

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are expected to know the law."); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947) (noting that individuals who seek to come within a statute or regulation are charged with knowledge of the contents of such statute or regulation, "regardless of actual knowledge").

[56] See Pet. 15 n.22 (discussing large number of cases that may be affected by the disposition of this case); see also Note, *Estopping the Government in Immigration Cases: The Immigration Estoppel Light Remains Cautionary Yellow*, 56 Notre Dame L. 731, 737 (1981) (footnotes omitted) (expressing opinion that the equities in *Hibi* favored the government because someone "who did not pursue his claim of citizenship for twenty-two years could not claim serious injustice," whereas a decision in his favor "could have resulted in successful claims by thousands of other Filipinos who were similarly situated" and could have "unduly harmed the public interest").

[57] In July 1973, a fire at the Military Personnel Record Center in St. Louis, Missouri, destroyed millions of Army records for the period between World War I and 1959. As the naturalization examiner for the *Pungilinan* respondents noted (Pet. App. 72a-73a), "[w]ithout military personnel records to verify alleged service the Government will be confronted with an administrative nightmare."

1151(b), 1153(a)(1). Awarding equitable relief to Filipino veterans under the now-expired provisions of the 1940 Act would thus threaten a serious distortion of both the naturalization and immigration policies established by Congress.

Finally, equitable relief is not respondents' only recourse. The court of appeals was profoundly wrong in asserting (Pet. App. 23a) that "[t]here is simply no other way to restore the lost opportunity for citizenship that Congress offered them • • • ." Should Congress conclude that respondents and those similarly situated deserve United States citizenship for their service during World War II, it is perfectly capable of providing relief through the legislative process. As the dissenting judges noted (*id.* at 40a n.2), the availability of a solution through Congress "lessens the justification for extraordinary judicial relief." And if Congress *refuses* to provide relief, as it has thus far,[58] that circumstance hardly provides a court of equity with justification to act for the purported purpose of carrying out Congress's intent.

[58] In the first session of the 93d Congress, Congressman Burton introduced a bill (H.R. 11963, 93d Cong., 1st Sess. (1973)) that would have allowed Filipinos who served honorably in "any United States Armed Force" during World War II, along with their spouses and children, to be admitted to this country as lawful permanent residents. The same proposal was reintroduced by Congressman Anderson (H.R. 1512, 94th Cong., 1st Sess. (1975)), and by Congressman Burton (H.R. 1568, 96th Cong., 1st Sess. (1979)). More recently, Congressman Dymally introduced two bills (H.R. 4895, 98th Cong., 2d Sess. (1984) and H.R. 5875, 98th Cong., 2d Sess. (1984)) that would have extended naturalization rights to Filipino veterans notwithstanding the 1952 Act and the cutoff date of Section 701. To our knowledge, these proposals have not generated action either in committee or on the floor.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

1. Sections 701, 702, and 705 of the Nationality Act of 1940, as amended by the Second War Powers Act, ch. 199, § 1001, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005, provided in pertinent part:[1]

> [Section 701.] • • • [A]ny person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and [w]ho shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; • • • *Provided, however,* That • • • (3) the petition shall be filed not later than December 31, 1946. • • •

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[1] The Nationality Act of 1940 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 280.

[Section 702.] During the present war, any person entitled to naturalization under section [701] of this [Act], who while serving honorably in the military * * * forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section [701] without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section [335] of this [Act], and to grant naturalization, and to issue certificates of citizenship: *Provided*, That the record of any proceedings hereunder, together with a copy of the certificate of citizenship shall be forwarded to and filed by the clerk of a naturalization court in the district designated by the petitioner and be made a part of the record of the court.

[Section 705.] The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms, and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this [Act].

2. The First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 14, provides in pertinent part:

* * * * *

In addition to the transfers authorized by section 3 of the Military Appropriation Act, 1946, transfers of not to exceed the amounts hereinafter set forth may be made, with the approval of the Bureau of the Budget, from the appropriation "Ordnance Service and Supplies, Army", to the following appropriations:

* * * * *

Army of Philippines, $200,000,000: *Provided*, That service in the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the armed forces of the United States pursuant to the military order of the President of the United States dated July 26, 1941, shall not be deemed to be or to have been service in the military or naval forces of the United States or any component thereof for the purposes of any law of the United States conferring rights, privileges, or benefits upon any person by reason of the service of such person or the service of any other person in the military or naval forces of the United States or any component thereof, except benefits under (1) the National Service Life Insurance Act of 1940, as amended, under contracts heretofore entered into, and (2) laws adminstered by the Veterans' Administration providing for the payment of pensions on account of service-connected disability or death: *Provided further*, That such pensions shall be paid at the rate of one Philippine peso for each dollar authorized to be paid under the laws providing for such pensions: *Provided further*, That any payments heretofore made under any such law to or with respect to any member of the military forces of the Government of the Commonwealth of the Philippines who served in the service of the armed forces of the

United States shall not be deemed to be invalid by reason of the circumstances that his service was not service in the military or naval forces of the United States or any component thereof within the meaning of such law.

3. The Act of June 1, 1948, ch. 360, 62 Stat. 281, amending the 1940 Act, provided in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Nationality Act of 1940, as amended (54 Stat. 1137; 8 U.S.C. 907), be amended by adding a new section to be known as section 324A, as follows:

"Sec. 324A. (a) Any person not a citizen who has served honorably in an active-duty status in the military or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States or an outlying possession (including the Panama Canal Zone, but excluding the Philippine Islands), or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: *Provided, however,* That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military or naval duty whatever or

refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section.

• • • • •

Sec. 2. The eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under section 701 of the Nationality Act of 1940, as amended (8 U.S.C., Supp. V, sec. 1001), and which is still pending on the date of approval of this Act, shall be determined in accordance with section 324A of the Nationality Act of 1940, as added by section 1 of this Act.

4. Section 329 of the 1952 Act, 8 U.S.C. 1440, provides in pertinent part:

(a) Any person who, while an alien or a noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, or during a period beginning February 28, 1961, and ending on a date designated by the President by Executive order as of the date of termination of the Vietnam hostilities, or thereafter during any other period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been

lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active duty status, and whether separation from such service was under honorable conditions: *Provided, however*, That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section. No period of service in the Armed Forces shall be made the basis of a petition for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.

* * * * *

(d) The eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under section 701 of the Nationality Act of 1940, as amended (56 Stat. 182, 58 Stat. 886, 59 Stat. 658), and which is still pending on the effective date of this chapter, shall be determined in accordance with the provisions of this section.

5. Section 310(e) of the 1952 Act, 8 U.S.C. 1421(e), provides:

Notwithstanding the provisions of section 405(a)[2] any petition for naturalization filed on or after September 26, 1961, shall be heard and determined in accordance with the requirements of this subchapter.

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[2] Section 405(a) of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 280, was a general savings clause that preserved the legal effectiveness of certain acts taken under provisions of prior law that were in other respects superseded by the 1952 Act.

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RESPONDENT'S

BRIEF

Nos. 86-1992 and 86-2019

In The
Supreme Court of the United States
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IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,
v.
ANTOLIN PUNSALAN PANGILINAN, et al.

IMMIGRATION AND NATURALIZATION SERVICE,
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BONIFACIO LORENZANA MANZANO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT MANZANO

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QUESTION PRESENTED

The question presented, as described by the petitioner, does not include an issue which applies to this individual respondent. In this case, therefore, the question is: Whether this individual respondent is entitled to be naturalized in view of the petitioner's complete failure of proof below.

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BONIFACIO LORENZANA MANZANO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT MANZANO

STATEMENT

Contrary to the assertion of the Immigration and Naturalization Service (INS) in its original petition, Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit (hereafter, *Manzano* Pet. Cert.) at 6, and the general impression given by its opening brief, the

issues in *Manzano* are not completely identical to those involved in *INS v. Pangilinan*, No. 86-1992.

There are some similarities, however. Manzano served honorably in the United States military forces in World War II, and, during the period of his active military service, he took no steps to apply for naturalization under the special wartime legislation. Thus, in this respect, he can be considered a "Category II" veteran.[1] However, at trial, the INS produced no evidence whatsoever in support of its assertions and did not, therefore, prove up its case. In this respect, Manzano's case differs slightly from that of most of the respondents in No. 86-1992.

SUMMARY OF ARGUMENT

Although Manzano shares certain aspects in common with the *Pangilinan* respondents, No. 86-1992, his case is basically different from the case of those veterans in that the INS submitted no evidence whatsoever at trial to support its contentions in his case. Thus, while there was no argument on the fact that INS withdrawal of the naturali-

[1] The INS, the courts and the respondent in this litigation have used a shorthand method of describing Filipino veterans of World War II. This method uses the term "Category I" veteran and "Category II" veteran. Deriving from the system set up in *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975), (hereafter *68 Veterans*), "Category I" refers to eligible veterans who tried to apply for naturalization before the expiration of the special wartime legislation on December 31, 1946. "Category II" refers to otherwise eligible veterans who took no steps while on active duty to try to apply for naturalization during that period. The INS considers veterans, like Manzano, who tried to apply during the period but after their discharge from military service to be in Category II.

zation examiner was peculiar to the Philippines, the INS produced no evidence to justify its discriminatory treatment of Filipinos. While the *Pangilinan* respondents stipulated on the evidence, Manzano was not a party to their agreement. The INS' attempts to use evidence from cases to which Manzano was *not* a party should not be allowed. If the INS chooses, for whatever reasons, not to submit the evidence in its possession, it should suffer the consequences and lose its case for failure of proof.

As to the issue of statutory construction, Manzano, through counsel, has conferred with counsel in *Pangilinan*, and he joins the arguments set out in their brief to be filed with the Court.

ARGUMENT

PETITIONER'S CASE FALLS FOR FAILURE OF PROOF

Immigration and Naturalization Service (INS) policies have forced Filipino World War II veterans to bring individual lawsuits. Since the Filipino veterans must fight their cases individually, the INS must respond in each individual case with appropriate evidence to establish its arguments. Where there is no evidence submitted, the INS must lose for its failure of proof.

A. The Problem: INS, Not Congress Or The Judiciary, Actually Decides Who Should Be Naturalized

INS Policy Forces Veterans To Litigate Individual Cases

One of the most variable factors in the Filipino veterans litigation over the years has been the attitude of the

INS. Naturalization is a matter entrusted in the first instance to the Congress. *Constitution,* Article I, Sec. 8, Cl. 4. That body has assigned to the courts the task of actually naturalizing the applicants. 8 U.S.C. 1421(a). Thus, the INS has no direct function to play. Its role is more akin to that of an investigator who assists the courts to perform their statutory role. 3 Gordon and Rosenfield, *Immigration Law and Procedure* 14.7a (1986). Yet the INS policy of the moment seems to be the major factor in the outcome of these cases.

However, the INS has had no consistent policy regarding Filipino veterans in the 42 years since the end of World War II. After the wartime naturalization statute was passed, the INS at some point allegedly decided that Filipino veterans were eligible to naturalize, and it made naturalization procedures available to them in approximately August of 1945. Brief for the Petitioner (hereafter Br.Pet.) at 7. This was a full ten months after the return of American forces to the Philippines and some five months after the capture of Manila and the liberation of the islands. 19 *Encyclopedia Britannica* 1009 (1975). However, about one month later, the INS decided to prevent such naturalizations under the wartime statute (Br. Pet. at 8). Later, the INS apparently decided that, in the naturalization proceedings of those few veterans who *were* able to file petitions based upon their military service, Philippine Commonwealth Army (PCA) service would not confer any benefits (*Id.,* at 9). This policy seems to have lasted until 1957 when, once again, the INS changed its mind and decided that PCA veterans could be naturalized. (*Id.,* n.12) From 1947 until 1977, the INS opposed

the efforts of all Filipino veterans to be naturalized under the expired wartime statute. Then, suddenly, the INS changed its mind again and decided that the veterans could be naturalized. This event occurred in November of 1977 when the INS withdrew its appeal in the *68 Veterans* case. Thereafter, in 1978, the INS once more changed its mind and decided that only some veterans (Category I and the "grandfather" cases) could be naturalized, and others (Category II cases filed after 1977) could not be naturalized (Br.Pet. at 10-11, notes 14, 15).

The INS' contradictory policies, especially the withdrawal of the appeal in the *68 Veterans* case, followed by a reevaluation of policy as to Category II veterans, has resulted in numerous individual actions being pursued in the courts. Thus, Mr. Manzano was forced by the INS' policy to bring an individual action on his naturalization petition.

Why should the INS exercise what has been, in effect, the sole power to determine who should and who should not be naturalized when the Congress passed a statute which was clear in its meaning? One might speculate that, in ten or twenty years, when these and other veterans are well into their 70's and 80's and 90's, and when there are, therefore, fewer veterans, the INS could change its mind again and decide that Category II veterans such as Mr. Manzano could be naturalized. If past history is any guide, we may reasonably expect such an event to occur in the future. If it could occur in ten or twenty years, why not now?

B. When INS Presents No Evidence, It Must Lose For Failure Of Proof

1. INS On Written Notice To Produce Evidence

Manzano specifically gave notice to the INS *before* the district court hearing that certain of its assertions of fact were in dispute. For example, Manzano clearly disputed the INS' allegations that its actions were prompted by foreign policy concerns and stated that "the Government's brief is not evidence and the Petitioner expects the Government to produce its evidence in this regard" (Manzano C.A. Excerpt of Record at 40; hereafter, C.A. Excerpt). The point was reiterated a second time and the need for the INS to produce its evidence was emphasized (*Id.* at 56-7).

While the parties agreed on the fact that the INS had withdrawn the naturalization examiner from the Philippines in 1945 and that such withdrawal was peculiar to the Philippines, they did not agree on the INS' reasons therefor. Fourteen of the respondents in *INS v. Pangilinan*, No. 86-1992, stipulated with the INS on the evidence (*Barretto v. U.S.*, 694 F. 2d 603, 605 (9th Cir., 1982), *reversed sub nom INS v. Litonjua*, 465 U.S. 1001 (1984); Petition For A Writ Of Certiorari to the Court of Appeals for the Ninth Circuit (hereafter *Pangilinan* Pet.Cert.) at 8), and the INS has lodged in that case copies of a total of twenty-three pieces of evidence (Lodging to *Pangilinan* Pet.Cert. (hereafter, *Lodging*) at 473-547). Not one of the items produced by the INS in its *Lodging* was submitted to the district court in Manzano's case.

2. INS' Evidence Not Matter Of General Public Knowledge And Not Susceptible Of Judicial Notice

The INS did not respond to Manzano's evidentiary argument in its certiorari filings. In reply to a similar argument by another veteran in No. 86-1992, however, it claimed that the evidence concerned "only historical facts involving the administration of the 1940 Act, which are well settled and are recounted in numerous Court decisions (citations omitted)" (Reply Memorandum for the INS at 7).

The general rule is that a court will not go outside the record of the case before it in order to take notice of the proceedings in another case unless the proceedings are put in evidence. *Morse v. Lewis*, 54 F. 2d 1027, 1029 (4th Cir., 1932), *National Surety Co. v. U.S.*, 29 F. 2d 92, 97 (9th Cir., 1928), *Paridy v. Caterpillar Tractor Co.*, 48 F. 2d 166, 168 (9th Cir., 1931), *Winslow v. U.S.*, 216 F. 2d 912 (9th Cir., 1954), *cert. den.* 349 U.S. 922 (1955), 20 *Am. Jur.* 105. Here, the INS made no attempt to put anything into evidence even in the face of written notice that its contentions of fact were being disputed.

How, then, can this evidence come in? The INS will undoubtedly try to assert that it is in the nature of historical fact. It is true that matters of history, if sufficiently notorious to be subject to general knowledge, can be subject to judicial notice. 20 *Am. Jur.* 82. However, the INS cannot, with a straight face, claim that its actions in 1945-6 with regard to the naturalization of Filipino veterans are sufficiently notorious to be a subject of general knowledge. The only knowledge we have at all comes

from evidence which apparently rested in the hands of the INS for the past 42 years. Some of this evidence was apparently presented to the courts in other cases, but it has not been presented in Mr. Manzano's case. The point is that since the INS presumably had a great deal of evidence in its possession, why did it submit zero pieces of evidence in Manzano's case and then try to bind him to the evidentiary findings of other courts in other cases to which he was not a party.[2]

The INS, finally, has resorted to the device of lodging with this Court alleged items of evidence bearing on its case against Manzano. *Lodging* 473-547. In spite of the fact that this evidence has been in the hands of the INS for over 42 years and in spite of the fact that some parts of it may have been produced in other cases, the INS never made this evidence a matter of record in Manzano's case. In fact, Manzano has previously pointed out that the INS' *Lodging does not* comprise all of the evidence which the INS has on the matter and, indeed, that important pieces of evidence have been excluded from the *Lodging* and willfully withheld from this Court (Brief of Respondent (Manzano) in Response to Pet. for Writ of Cert. at 8-9).

The INS cannot deny the fact that it did not ask the district court below to take judicial notice of any fact whatsoever, and there is no evidence in the record to show that

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[2] The INS seems to be trying to establish a kind of collateral estoppel on the evidence as to Manzano even though it had previously complained of the use of collateral estoppel against it. *U.S. v. Mendoza*, 464 U.S. 154 (1984) (government cannot be collaterally estopped in civil cases from relitigating against different party an issue it may have lost in a previous case).

the district court judge took judicial notice *sua sponte* of any fact at all. This failure to even ask for judicial notice is all the more damaging to the INS coming, as it does, in the face of Manzano's written notice that certain essential facts were in dispute and that the INS would have to produce its evidence.

The central issue in Mr. Manzano's case, as well as in the cases of most of the veterans, is the INS' alleged justification for its admitted actions to deprive eligible Filipinos of their legal rights to apply or not to apply for naturalization during the 1945-46 period. The more critical an issue to a particular litigant's position, the more reluctant courts have been to determine the issue by taking judicial notice. *TWA, Inc. v. Hughes*, 308 F. Supp. 679 (SDNY 1969), *modified on other grounds*, 449 F. 2d 51, *reversed on other grounds*, 409 U.S. 363, *rehearing denied*, 410 U.S. 975.

3. INS Failure of Proof Establishes Manzano's Case

Since Filipinos were by statute nationals of the United States owing full allegiance to this nation until Philippine independence on July 4, 1946 (Philippine Independence Act, 48 Stat. 456, Sec. 2(a)(1)), they were protected by certain fundamental rights, including the Fifth Amendment. *Balzac v. Porto Rico*, 258 U.S. 298, 312-313 (1922). Moreover, it is clear that the Fifth Amendment encompasses the right to equal protection of the laws. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Discrimination based upon national origin violates this constitutional right to equal protection unless it is shown

to be necessary to the vindication of a compelling governmental interest. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971). The parties conceded that the withdrawal of an official empowered to administer naturalization pursuant to the wartime statute was peculiar to the Philippines, but the INS presented no evidence purporting to justify such discrimination. It follows therefrom that the INS failed to meet its burden of showing that the differential treatment was necessary to the achievement of a compelling governmental interest.

Thus, Manzano was denied the equal protection of the laws guaranteed by the due process clause of the Fifth Amendment, and the proper remedy is the allowance of naturalization pursuant to the Nationality Act of 1940, as amended by the Second War Powers Act, P.L. 77-507, 56 Stat. 182, March 28, 1942. *Pangilinan v. INS.*, 796 F. 2d 1091 (9th Cir., 1986). Likewise, the INS produced no evidence to justify its position on the issue of statutory construction, and the same result should obtain. *Id.*

Manzano Joins Other Respondents As To Common Issues

Insofar as the issue of statutory construction, and any other issues, can have any relevance to this case, in view of the INS' failure of proof, Manzano, through counsel, has conferred with counsel in No. 86-1992, and he joins their arguments to be set out in their brief which will be filed separately.

CONCLUSION

The INS has clearly failed to prove that its actions with regard to the administration of the naturalization laws in Mr. Manzano's case were *in any way* justifiable. Thus, the INS' case falls for failure of proof, and Mr. Manzano should be naturalized. A rule that the INS must submit its evidence in those cases which it chooses to litigate works no undue hardship upon the INS in future cases. Mr. Manzano, by virtue of his military service, is otherwise eligible, and he is deserving of naturalization.

As his old commander, General Douglas MacArthur, said of Filipinos like Manzano who fought against the Japanese occupation:

> "These inadequately armed patriots have fought the enemy for more than two years. Their names and deeds shall ever be enshrined in the hearts of our two peoples." *Back to Bataan*, RKO Radio Pictures, Inc. (1945).

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT A. MAUTINO
BAXLEY AND MAUTINO
Attorneys for Respondent Manzano

January 1988

RESPONDENT'S

BRIEF

Nos. 86-1992 and 86-2019

In The

Supreme Court of the United States

October Term, 1987

IMMIGRATION AND NATURALIZATION SERVICE

v. *Petitioner,*

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IMMIGRATION NATURALIZATION SERVICE

v. *Petitioner,*

BONIFACIO LORENZANA MANZANO

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QUESTION PRESENTED

The question presented, as described by the petitioner, does not include issues which apply to this individual respondent. In this case, therefore, the question is: Whether this individual respondent is entitled to be naturalized in view of the petitioner's complete failure of proof below and the respondent's present status as a citizen of the United States.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT LITONJUA

STATEMENT

Contrary to the position of the Immigration and Naturalization Service (INS) in its opening brief, the

issues concerning respondent Litonjua are not completely identical to those involved in the cases of the other respondents in *INS v. Pangilinan*, No. 86-1992. There are some similarities, however. Litonjua served honorably in the United States Navy in World War II, and, during the period of his active military service, that is, from May 9, 1941 through April 10, 1946, he took no steps to apply for naturalization under the special wartime legislation. Thus, in this respect, he can be considered a "Category II" veteran.[1] However, Litonjua actually filed a naturalization application in the United States in 1946, and the INS failed to process it and misinformed him as to his eligibility for citizenship. In addition, at trial, the INS produced no evidence whatsoever in support of its assertions and did not, therefore, prove up its case. Finally, Litonjua is now a citizen of the United States, having been administered the oath of citizenship in 1983. In these respects, therefore, Litonjua's case differs slightly from that of the other respondents in No. 86-1992.

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[1] The INS, the courts and the respondent in this litigation have used a shorthand method of describing Filipino veterans of World War II. This method uses the term "Category I" and "Category II" veteran. Deriving from the system set up in *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975), hereafter *68 Veterans*, "Category I" refers to eligible veterans who tried to apply for naturalization before the expiration of the special wartime legislation on December 31, 1946. "Category II" refers to otherwise eligible veterans who took no steps while on active duty to try to apply for naturalization during that period. The INS considers veterans, like Litonjua, who tried to apply during the period but after their discharge from military service to be in Category II.

SUMMARY OF ARGUMENT

Although Litonjua shares some aspects in common with the other *Pangilinan* respondents (No. 86-1992), his case is different from the cases of those veterans in that the INS submitted no evidence whatsoever at trial to support its contentions in Litonjua's case. Thus, while there was no argument on the fact that INS' withdrawal of the naturalization examiner was peculiar to the Philippines, the INS produced no evidence to justify its discriminatory treatment of Filipinos. While the other *Pangilinan* respondents stipulated on the evidence, Litonjua was not a party to their agreement. The INS' attempts to use evidence from cases to which Litonjua was *not* a party should not be allowed. If the INS chooses, for whatever reason, not to submit the evidence in its possession, it should suffer the consequences and lose its case for failure of proof.

Litonjua is now a citizen of the United States. It would be unfair to disturb that status now in view of his five years of honorable wartime service to the United States. The INS' position is not harmed if Litonjua's case is affirmed as it will still have its decision in the case of the other fourteen respondents.

Litonjua is a Category I veteran in that he filed, or constructively filed, a naturalization application in the United States in 1946, and the INS misinformed him as to his eligibility for naturalization. This issue was not reached by the Court of Appeals. Should this Court decide the instant matter in favor of the INS on the issues presently before it, Litonjua's case should be remanded to the Court of Appeals for further argument on the Category I issue.

As to the issue of statutory construction, Litonjua, through counsel, has conferred with counsel for the other respondents in *Pangilinan,* and he joins the arguments set out in their brief to be filed with the Court.

ARGUMENT

INS CASE FALLS FOR FAILURE OF PROOF

As in the case of *INS v. Manzano,* No. 86-2019, the INS offered no evidence below to support its assertions that its actions in 1945-6 were in any way justifiable. Like veteran Manzano, Litonjua was never a party to the evidentiary stipulation entered into between the INS and the remaining respondents in No. 86-1992. (Appendix to Petition For a Writ of Certiorari in No. 86-1992 at 128a-129a). The total lack of INS evidence was pointed out to the district court judge at the trial on December 15, 1980 (Reporter's Transcript of Proceedings (hereafter R.T.) at 21 *in* C.A. Excerpt of Record), and, in the many submissions thereafter to the Court of Appeals and this Court, Litonjua has always held himself apart from the evidentiary stipulation and has never agreed that the INS' representations in his case have ever been proven.

Counsel's argument in *INS v. Manzano,* supra, clearly shows that the INS' evidence is not a matter of general public knowledge and that it is not susceptible of judicial notice. Litonjua joins Manzano's argument in this regard as set out in the Brief For Respondent Manzano in No. 86-2019.

LITONJUA IS A CITIZEN OF THE UNITED STATES

Mr. Litonjua was naturalized on May 6, 1983 by the Honorable Gordon Thompson, Jr. in the United States District Court for the Southern District of California. Thus, in addition to the other items which separate his case from that of the other respondents, his case differs also in this respect. The INS' position is not harmed if the decision in Mr. Litonjua's case is affirmed. The INS would suffer no prejudice as it can still get its review of the issues posited in its brief (Brief For The Petitioner) in the cases of the veterans who remain in No. 86-1992.

LITONJUA IS CATEGORY I VETERAN WHO CONSTRUCTIVELY FILED NATUALIZATION PETITION IN 1946

Litonjua has argued all along that he is a Category I veteran in that he did make an application for naturalization in Seattle in 1946 (C.A. Excerpt of Record at 33-38). Alternatively, he has also argued that he should be considered to have constructively filed his petition because he took all of the steps which he could possibly take to file his petition, and the failure to complete the process was not due to any failing on his part (*Id.*). The Court of Appeals did not reach either argument. *Pangilinan v. INS,* 796 F. 2d 1091, 1095, n.3. Thus, if the Court decides the issues before it in favor of the INS, Litonjua's case should be remanded to the Court of Appeals for argument and decision on the Category I issue.

LITONJUA JOINS OTHER RESPONDENTS AS TO COMMON ISSUES

Insofar as the issue of statutory construction, and any other issues, can have any relevance to this case, in view of the INS' failure of proof and Litonjua's United States citizenship, Litonjua, through counsel, has conferred with counsel for the remaining veterans in No. 86-1992, and he joins their arguments to be set out in their brief which will be filed separately.

CONCLUSION

Litonjua is eligible for naturalization because the INS has clearly failed to prove that its actions with regard to the administration of the naturalization laws in Mr. Litonjua's case were *in any way* justifiable. Thus, the INS' case falls for failure of proof, and Mr. Litonjua should be naturalized. A rule that the INS must submit its evidence in those cases which it chooses to litigate works no undue hardship upon the INS in future cases. Finally, Mr. Litonjua is now a citizen of the United States, and it would be unfair to disturb that status now in view of his wartime service to the United States.

Mr. Litonjua served in the United States Navy for five years during the entire period of World War II. He was captured by the Japanese on Corregidor, and he spent time in a Japanese prisoner of war camp (R.T. at 4). He is otherwise eligible for citizenship and, in view of his heroic wartime service to the United States, he is deserving of naturalization.

The decision below should be affirmed.

Respectfully submitted,

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Attorneys for Respondent Litonjua

January 1988

REPLY

BRIEF

No. 86-1992 and 86-2019

In the Supreme Court of the United States

OCTOBER TERM, 1987

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

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v.

BONIFACIO LORENZANA MANZANO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1992

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ANTOLIN PUNSALAN PANGILINAN, ET AL.

No. 86-2019

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

BONIFACIO LORENZANA MANZANO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In our opening brief, we argued that the court of appeals erred in holding that respondents were entitled to citizenship under a statute that expired in 1946. First, we showed (Gov't Br. 24-29) that the court's opinion conflicts with this Court's decision in *INS* v. *Hibi*, 414 U.S. 5 (1973). Second, we demonstrated (Gov't Br. 30-41) that the Attorney General acted properly in revoking the vice consul's naturalization authority. Third, we showed (Gov't Br. 41-50) that even if the Attorney General exceeded his authority, the court of appeals was not warranted in ordering citizenship as an equitable remedy.

1. Respondents make no attempt to answer our showing that they have merely utilized a different label to seek the same relief that was denied by the Court in *Hibi* (see Gov't Br. 24-29; see also *Hibi* Mem. in Opp. Cert. 15). Instead, they claim (Pang. Br. 12-14)[1] that *Hibi* is distinguishable in two ways.

First, they maintain that, unlike in *Hibi*, "respondents have consistently raised the constitutional arguments that the Attorney General's decision to prevent them from filing petitions for naturalization in 1945 deprived them of due process and the equal protection of the laws" (Pang. Br. 13). We fail to see the relevance of that argument as a way of supporting the court of appeals' decision. As we explained in our opening brief (Gov't Br. 15), the court below decided the case solely on statutory grounds specifically to "avoid deciding" the constitutional arguments raised by respondents (Pet. App. 20a). Respondents do not—and cannot—explain how the court's statutory analysis can be reconciled with *Hibi*.[2]

Second, respondents contend that, "[i]n contrast to the facts as characterized in *Hibi, these respondents* have consistently argued that the majority's view of the 1945 events as neglect does not represent a full and fair description of what really happened" (Pang. Br. 14 (emphasis added)). According to respondents, the Attorney General's revoca-

[1] "Pang. Br." refers to the brief filed on behalf of all sixteen respondents; "Lit. Br." and "Manz. Br." refer respectively to the separate briefs filed by respondents Litonjua and Manzano containing additional arguments applicable only in their individual cases.

[2] In any event, as we show *infra*, respondents' constitutional arguments—which are themselves nothing more than new labels for the same arguments made and rejected in *Hibi*—are also foreclosed by that decision.

tion of the vice consul's naturalization authority was "*a deliberate, unambiguous decision* to prevent operation of the law by making naturalization impossible for the very people that the Attorney General himself had acknowledged to be among the law's intended beneficiaries" (*ibid.* (emphasis added)). That argument, far from distinguishing *Hibi*, only demonstrates that respondents are making the same assertions here that the Court rejected in *Hibi*. The respondent in *Hibi*—who was represented by lead counsel for respondents in this case—not only made the very same arguments but used virtually identical language (*Hibi* Mem. in Opp. Cert. 6):

> [T]his case involves the *deliberate and calculated decision* of the Commissioner of Immigration, with the consent of the Attorney General of the United States, to single out Filipino soldiers in the Philippines and to deny to *all* of them the opportunity to accept the offer of citizenship tendered them by Congress. ["all" emphasized in original; other emphasis added][3]

Thus, neither ground offered by respondents for distinguishing *Hibi* is even arguably persuasive. Indeed, respondents' invitation to the Court to "reassess" its *Hibi*

[3] See also *Hibi* Mem. in Opp. Cert. 3 (arguing that the "[d]eliberate [r]efusal" of the Commissioner of Immigration to implement the citizenship program violated principles of separation of powers); *id.* at 6 (asserting that the Commissioner of Immigration "deliberately refus[ed] to do what Congress plainly wanted done"); *id.* at 8 ("the benefits of [the statute] were deliberately and specifically denied to Filipinos exclusively"); *id.* at 12 ("the naturalization representative was withdrawn for the express purpose of preventing the naturalization of Mr. Hibi and other Filipino soldiers"); *Hibi* Pet. for Reh'g 3 (characterizing case as involving "the commission of an intentional act on the part of a high administrative official"); *id.* at 7 (describing the revocation of the vice consul's authority as a "conscious, intentional, deliberate and affirmative act").

decision (Pang. Br. 14)—an invitation this Court should decline—is a virtual concession that the decision is dispositive.

2. a. Respondents have offered no convincing argument to support their contention that the Attorney General violated the 1940 Act[4] in revoking the vice consul's naturalization authority. As we explained (Gov't Br. 32-34), while the terms of that Act were ambiguous enough to allow the Attorney General to conclude that the offer of citizenship embraced servicemen who enlisted in the Philippines, including those serving in the Commonwealth Army, there is no evidence that Congress specifically intended to extend the offer to them. Respondents' entire case is based on the premise that the Attorney General contravened "the will of Congress" (Pang. Br. 1-2, 10),[5] but in the end, all they can say is that

[4] Sections 701, 702, and 705 of the Nationality Act of 1940, as amended by the Second War Powers Act, 1942, ch. 199, § 1001, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002, and 1005.

[5] Respondents offer four unconvincing reasons for their assertion that the will of Congress was violated. First, they state (Pang. Br. 7) that the legislation was enacted at the time the battles of Bataan and Corregidor were being fought. Yet they cite nothing to show that the 1940 Act was passed to reward Filipino servicemen for their role in such battles. Second, they state (*ibid.*) that "Congress obviously knew" when it passed the 1940 Act that "large numbers of Filipino soldiers had been inducted into the army of the United States by President Roosevelt's executive order." Again, however, respondents cite nothing to show that Congress contemplated that the program would apply to the thousands of Filipino servicemen who did not enlist directly in the United States Armed Forces but who instead were members of their own national army which, as a unit, was "call[ed] and order[ed] into the armed forces of the United States" pursuant to a presidential order (Lodging 482). Indeed, the House initially rejected the proposed citizenship program after fears were expressed that thousands of aliens who had never been in the United States would become citizens through service in our armed forces (88 Cong. Rec. 1790-1791, 1794-1799 (1942)). Apparently to allay those concerns, the Conference Committee added language requiring that the soldier be lawfully admitted to the United States, including its territories and possessions (H.R. Conf. Rep. 1896, 77th Cong., 2d Sess. 3 (1942)). In light of these concerns, it is doubtful that Congress contemplated, without specific mention, that it was authorizing citizenship for the many thousands of soldiers in the Philippine Commonwealth Army. Third, respondents point out (Pang. Br. 7) that the 1940 Act, by its terms, applied to any member of the armed forces who was "not a citizen." The use of that language (rather than the term "alien"), they suggest, must have been in contemplation of Philippine soldiers. In fact, however, the same language was used in a subsequent statute dealing with citizenship for members of the armed forces. See Act of June 1, 1948, ch. 360, 62 Stat. 281. As we explained (Gov't Br. 40-41, 42), the latter statute specifically excluded servicemen who enlisted in the Philippines unless they later become lawful permanent residents of the United States. Clearly, the language "not a citizen" is not synonymous with "Philippine national." Finally, respondents point out (Pang. Br. 8) that the statute applied to veterans who were lawfully admitted to the United States or its "territories or possessions." As noted, however, this language was apparently added to limit the coverage of the program. Since the Philippines had certain highly relevant characteristics of a foreign country (see Philippine Independence Act of 1934, ch. 84, § 8(a)(1), 48 Stat. 462 (citizens of the Philippines treated as aliens for immigration purposes)) and their independence was imminent (*id.* § 10(a), 48 Stat. 463), it is questionable whether Congress thought that the islands were embraced within the term "territories and possessions."

"it was not likely" that Congress meant to "exclude" Philippine servicemen from the statute's benefits (*id.* at 8). The issue, however, is not whether Congress affirmatively intended to "exclude" Philippine servicemen, but rather whether a specific congressional intent to *include* them existed which precluded the Attorney General from suspending implementation of the statute *in the Philippines* (while still applying the statute *to Filipinos* elsewhere) in the exercise of his interpretive and foreign policy discre-

tion. Respondents have cited nothing to show that Congress possessed such a conscious intent.[6]

b. Respondents' principal basis (Pang. Br. 1, 4-5) for claiming that the Attorney General acted unlawfully is a single sentence from this Court's decision in *INS* v. *Miranda*, 459 U.S. 14, 18 (1982), in which the Attorney General's action was referred to as "error." According to respondents (Pang. Br. 5), the government is "foreclosed [by *Miranda*] from arguing that the Attorney General's conduct was not error." As the dissenting judges below noted (Pet. App. 32a), however, "[i]t is inconceivable that the Court [in *Miranda*] resolved this important and difficult question in such an off-hand manner in a case where it was not argued, briefed or even at issue."

The dissenters' point is particularly strong in light of the fact that the Court in *Miranda* did not simply describe the "error" as "clear" in *Hibi*; rather, it used that characterization with respect to the governmental actions both in *Hibi* and in *Montana* v. *Kennedy*, 366 U.S. 308 (1961). See Gov't Br. 16 n.27 (quoting from 459 U.S. at 18). The Court in *Montana*, however, did not hold that the conduct involved there—an alleged refusal of a consular official to issue a passport to a pregnant woman to return to the United States—was necessarily error. Rather, the Court suggested that the official may have simply given "well-meant advice" that the woman was in no condition

[6] In addition, respondents essentially ignore our submission that the 1940 Act gave the Attorney General broad discretion in carrying out the citizenship program (Gov't Br. 31). They merely assert (Pang. Br. 6 (footnote omitted)), without analysis, that the Attorney General had *no* discretion in carrying out the statute but was under a "plain duty" to "mak[e] the services of naturalization representative [*sic*] available to qualified veterans on the scene." The 1940 Act simply does not support this contention (see Gov't Br. 31).

to travel (366 U.S. at 314-315).[7] Thus, it appears that the point of the statement in *Miranda* was simply to contrast the situation involved there—mere delay in processing an application for adjustment of status—with the specific, affirmative acts taken by the officials in *Hibi* and *Montana*, in order to point out that, since the latter acts were not affirmative misconduct giving rise to an estoppel, it followed *a fortiori* that the mere inaction involved in *Miranda* did not give rise to an estoppel.

3. a. Respondents provide no convincing basis for the court of appeals' invocation of equitable authority. Without really answering our submission that the court of appeals' decision conflicts with the terms of several statutes (Gov't Br. 39-42, 45),[8] respondents nonetheless

[7] Indeed, lead counsel for respondents, in discussing *Montana* in a petition for rehearing filed with this Court in *Hibi*, noted that the conduct at issue there was "ambiguous" and that it therefore could not "be said [that] the government official was guilty of a consciously wrongful act" (*Hibi* Pet. for Reh'g 5).

[8] Respondents assert that they do not fall within the purposes of 8 U.S.C. 1421(e) (Pang. Br. 15-16), but they essentially ignore the two statutes expressly applicable to Philippine servicemen (Act of June 1, 1948, ch. 360, 62 Stat. 281; First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 6) as well as a third statute (8 U.S.C. 1440(d)) that specifically requires all pending citizenship applications under Section 701 of the 1940 Act to be reviewed under the Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. IV) 1101 *et seq.* See Gov't Br. 39-42. The only argument they make as to why the latter three statutes are not dispositive is that Congress did not explicitly ratify the Attorney General's actions (Pang. Br. 10-11, 18). But in fact, the statutes are far broader than the mere ratification of the revocation of the vice consul's naturalization authority. As we explained (Gov't Br. 39-41), those statutes make clear that servicemen who enlisted or were inducted in the Philippines were not eligible for citizenship under liberalized conditions, even if they had pending applications under the 1940 Act. If Congress was willing to cut off benefits of the program to servicemen in the Philippines who sub-

assert that the remedy fashioned by the court "gives effect to Congress' purpose under the 1940 Act" (Pang. Br. 18-19). However, as noted, the 1940 Act did not reflect an express purpose to award citizenship to soldiers who enlisted or were inducted in the Philippines. Moreover, as the Court recognized in *Hibi*, the December 31, 1946, cutoff date under the 1940 Act reflected "the public policy established by Congress" (414 U.S. at 8). Since the court of appeals' remedy thus contravenes the public policy underlying the 1940 Act as well as the policies of several subsequent statutes, there is no basis for respondents' assertion that the court below was somehow carrying out Congress's intent.

b. Respondents do not dispute our claim (Gov't Br. 46-48) that equitable relief is inappropriate in the absence of demonstrable injury. They contend, however, that they sustained injury as a result of the Attorney General's actions. Without identifying *how* they were injured, they state that "their injury does not depend on their knowledge because their knowledge was irrelevant to the availability of the benefits of the 1940 Act" (Pang. Br. 19 (footnote omitted)). That contention is unpersuasive; since respondents, by their own admissions, did not even know about the overseas naturalization program while they were on active duty (see Gov't Br. 12 n.17; Lodging 334, 463; Gov't C.A. Br. (*Manzano*) 2), they suffered no harm by the absence of an examiner. And in light of respondents' admissions, we fail to see how they are helped by their fallback argument (Pang. Br. 19 n.5) that, if knowledge is a prerequisite, "a naturalization court can inquire of each

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mitted timely applications that had not been ruled upon, it could not possibly have intended that individuals such as respondents, who did not even know about the program while they were on active duty (see *infra*), could claim its benefits 40 years later.

applicant under the 1940 Act whether he knew of opportunities under the Act in 1945-46."

c. While respondents do not dispute our contentions that a court must balance the equities before ordering relief and that the court below failed to do so (Gov't Br. 45), they assert that the equities favor their position (Pang. Br. 18-21). What they overlook, however, is that if they prevail, the government will be faced with similar claims by potentially thousands of other alleged Philippine veterans (see Pet. 15 n.22). Because the facts at issue—possession of the necessary qualifications for citizenship—relate to events of more than 40 years ago, the naturalization courts will have great difficulty in making reliable assessments of applicants' claims that they qualified under the 1940 Act. In addition, contrary to respondents' assertion that the "spillover" effect on the immigration system would be minimal (Pang. Br. 21), the fact is that it could be quite substantial (see Gov't Br. 48-50). Most fundamentally, respondents do not show how the equities weigh in their favor when they did not apply for citizenship under the 1940 Act until more than three decades after the statute's expiration date.

4. Finally, respondents maintain (Pang. Br. 22-31) that the Attorney General's actions violated their constitutional rights, a claim not reached by the court below (see Pet. App. 20a). However, the reasons why their statutory arguments must fail, as discussed in our opening brief (Gov't Br. 23-50), also demonstrate the lack of merit to their constitutional claims.

a. To begin with, the constitutional "due process" and "equal protection" claims raised by respondents are nothing more than different labels for identical arguments made and rejected in *Hibi*. As we indicated (page 3, *supra*), the arguments made in *Hibi* were not only in substance the same as those made here but even involved

virtually identical language.[9] Had the Court in *Hibi* believed that the Attorney General's conduct violated the constitutional rights of Philippine servicemen, it is highly unlikely that it would have concluded that such conduct did not rise to the level of "affirmative misconduct" (414 U.S. at 8).

Moreover, respondents cannot prevail unless they meet the requirements for equitable relief. And as we demonstrated (Gov't Br. 45-50), under a balancing of the equities, respondents are not entitled to such relief. They cannot ignore the requirements for equitable relief merely by labeling their claims as constitutional challenges. See generally *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 12, 15-16 (1971); *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948) ("It is *always* the duty of a court of equity to strike a proper balance between the

[9] The only new argument made by respondents is an unfounded accusation that the Attorney General's actions were motivated by racial animus rather than foreign policy concerns (Pang. Br. 31; but see *id.* at 7 (suggesting that the Attorney General's acts were based on "the objections of Philippine officials")). Yet even the court below acknowledged that the Attorney General's actions were in response to concerns of Philippine officials that their newly emerging nation would suffer a manpower drain (see Pet. App. 3a, 44a). See also *Hibi*, 414 U.S. at 10-11 (Douglas, J., dissenting) (noting that the revocation of the vice consul's authority was in response to concerns expressed by the Philippine government); *Olegario* v. *United States*, 629 F.2d 204, 209-210 (2d Cir. 1980) (same), cert. denied, 450 U.S. 980 (1981); *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 935-936 (N.D. Cal. 1975) (same). Indeed, respondents' charge of racism is frivolous in light of the facts that (1) the Attorney General initially applied the 1940 Act in the Philippines even though the statute did not explicitly so require (Gov't Br. 32-34 & n.36); (2) several thousand Filipinos were naturalized outside the Philippines, where Filipinos were continuously eligible for naturalization while the 1940 Act was in effect (*id.* at 6); and (3) the citizenship program was reinstated in the Philippines in August 1946 (*id.* at 9).

needs of the plaintiff and the consequences of giving the desired relief" (emphasis added)).

b. In any event, even if *Hibi* and principles of equity did not foreclose their claim, respondents' constitutional arguments are totally without merit. Due process interests are implicated only when a governmental decision deprives a person of something to which he has " 'a legitimate claim of entitlement.' " *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979) (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)). An " 'abstract need or desire' " or " 'a unilateral expectation' " does not suffice (*ibid.*). Respondents assert that the revocation of the vice consul's naturalization authority deprived them of a property interest (Pang. Br. 22-28), but they fail to identify any legally cognizable interest that was denied to them.

Since respondents did not attempt to submit timely applications for naturalization, they cannot claim that they were deprived of a right to have their applications acted on and approved if they met the necessary qualifications. Their claim can only be that the revocation of the vice consul's authority deprived them of an opportunity to submit their applications.[10] But since the vice consul possessed naturalization authority for three months while respondents were on active duty in the Philippines (Gov't Br. 47), they cannot claim *total* deprivation of that opportunity. Thus, the real essence of their claim must necessarily be that the statute vested them with a right to personal notice of the citizenship program and to the *continuous*

[10] Respondents assert that an opportunity to apply for citizenship "was granted in *exchange* for a service to the United States" (Pang. Br. 25 (emphasis in original)). In light of the fact that they did not even know about the citizenship program until after they were out of the service (see page 8, *supra*), and therefore could not have enlisted for that reason, their claim of a contractual entitlement is specious.

availability of an examiner to whom they could submit their applications. As we have shown (Gov't Br. 31, 47 n.52), however, no such rights can be found in the terms of the statute; to the contrary, the statute contained no notice provision, and it left all decisions concerning the designation of overseas examiners entirely to the discretion of the Attorney General and the Commissioner of Immigration and Naturalization. If the statute imposed a duty upon the Attorney General to make an examiner continuously available to every eligible alien serviceman, it would logically follow that *every* overseas soldier who did not have convenient and uninterrupted access to an examiner during the entire time the citizenship program was in effect could make out a due process claim and seek present day citizenship as an equitable remedy. Such a result would render meaningless the December 31, 1946, statutory cutoff.

Respondents' equal protection claim is similarly without substance. As they in essence concede (Pang. Br. 20), the three-month presence of an examiner in the Philippines compared favorably to the merely periodic presence of an examiner elsewhere in the world. The *continuous* presence of a naturalization examiner in the Philippines would have given them a *greater* opportunity to apply for citizenship than alien servicemen elsewhere were afforded. The failure to afford them an even more favorable position can hardly be deemed a denial of "equal" protection.

In any event, our showing that the Attorney General's actions were within his statutory authority (Gov't Br. 29-41) disposes of respondents' equal protection claim. In the area of immigration and naturalization, classifications made by Congress or the President, such as those based on nationality, must be upheld unless they are wholly irrational or lacking in facial legitimacy. See generally *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Mathews* v. *Diaz*, 426

U.S. 67, 79-83 (1976); *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980). Here, the Attorney General's actions were a rational and legitimate response to substantial concerns raised by Philippine officials. See note 9, *supra*. As the Second Circuit stated in *Olegario* v. *United States*, 629 F.2d 204, 233 (1980), cert. denied, 450 U.S. 980 (1981), in rejecting an identical equal protection argument, the revocation of the vice consul's authority "was justified in light of the express federal interest in responding to the concerns voiced by the Philippine government."[11]

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[11] The additional individualized arguments made by respondents Litonjua and Manzano require only a brief response. First, those respondents maintain (Lit. Br. 4; Manz. Br. 3) that the government cannot prevail because it did not introduce any evidence in their cases concerning the historical events at issue. In fact, however, the burden of proof is on the *applicant* to establish eligibility for citizenship. See, *e.g.*, *Berenyi* v. *District Director*, 385 U.S. 630, 637 (1967). Litonjua and Manzano did not introduce historical evidence to show that the 1946 statutory cutoff should be disregarded. Thus, if they are correct that the events of 1945-1946 must be established by evidence in each naturalization proceeding, then their claims must fail for want of proof. In any event, the events at issue have been described in numerous court decisions and are therefore properly subject to judicial notice. Cf. Pang. Br. 12 (noting that the present case and *Hibi* "are founded on the same historical circumstances"). On a related matter, Manzano errs in claiming (Manz. Br. 8) that the government omitted "important pieces of evidence" from its Lodging filed with this Court. To our knowledge, the Lodging includes all of the historical documents that were made part of the record in any of the present cases. To the extent that there are other historical documents of potential relevance, Manzano does not explain why *respondents* did not offer them as evidence or otherwise attempt to rely on them in this case.

Finally, Litonjua errs in claiming that there are critical facts that make his case unique. First, he claims (Lit. Br. 5) that he is a "Category I" veteran and therefore qualifies for citizenship under the government's policy of not opposing naturalization petitions of

For the foregoing reasons and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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veterans in that category (see Gov't Br. 11 n.15). But as the district court noted in rejecting that claim (Pet. App. 55a), Litonjua is not a Category I veteran because he made no effort to obtain citizenship until *after* he left the armed forces. Litonjua also errs in apparently suggesting (Lit. Br. 5) that his case is moot because he persuaded the district court to naturalize him, over the government's objections, notwithstanding the pendency of appellate proceedings. Reversal of the judgment of the court of appeals would enable the government to have the naturalization decree vacated pursuant to 8 U.S.C. 1451(j) and Fed. R. Civ. P. 60(b)(5). See generally *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972).

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